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11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION

14 **PETER HERNANDEZ,**

Petitioner,

15  
16 v.

17 **BEN CURRY,**

18 Respondent.  
19

C08-2278 JSW

**ANSWER TO PETITION FOR  
WRIT OF HABEAS CORPUS;  
MEMORANDUM OF POINTS  
AND AUTHORITIES**

Judge: The Honorable  
Jeffrey S. White

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MEMORANDUM OF POINTS  
AND AUTHORITIES**

Judge: The Honorable  
Jeffrey S. White

20 As an Answer to the Petition for Writ of Habeas Corpus filed by inmate Peter Hernandez,  
21 Respondent, admits, alleges, and denies that:

- 22 1. Hernandez is in the lawful custody of the California Department of Corrections and  
23 Rehabilitation following his March 9, 1979 conviction for first-degree murder. (Pet. at p. 2.)  
24 Hernandez is serving a sentence of seven years to life in prison. (*Id.*)  
25 2. In 2007, Hernandez filed a petition for writ of habeas corpus in Los Angeles County  
26 Superior Court, alleging that the Board of Parole Hearings' 2006 decision denying him parole  
27 violated his due process rights because the Board failed to provide him with individualized  
28 consideration and there was insufficient evidence of his unsuitability. (Ex. A, Super. Ct. Pet.;

1 Ex. B, Super. Ct. Order.) Hernandez also alleged that the denial violated his equal protection  
 2 rights, that the Board has a no-parole policy, and that he was entitled to immediate release based  
 3 on the Board's regulatory matrices. The superior court denied the petition, finding that "the  
 4 record contains 'some evidence' to support a finding that petitioner would pose an unreasonable  
 5 risk of danger to society and is unsuitable for parole." (Ex. B at 1.)

6 3. Hernandez then raised the same claims in petitions to the California Court of Appeal  
 7 and the California Supreme Court. (Ex. C, Ct. App. Pet.; Ex. D, Resp't's Informal Resp.; Ex. E,  
 8 Pet'r's Reply; Ex. F, Ct. App. Order; Ex. G, Sup. Ct. Pet; Ex. H, Sup. Ct. Order.) Both petitions  
 9 were summarily denied. (Ex. D; Ex. F.)

10 4. Respondent admits that Hernandez exhausted his state court remedies regarding his  
 11 claims that the Board failed to provide him with individualized consideration, that there was  
 12 insufficient evidence of his unsuitability, that the denial violated his equal protection rights, that  
 13 the Board has a no-parole policy, and that he was entitled to immediate release based on the  
 14 Board's regulatory matrices. Respondent denies that Hernandez has exhausted his claims to the  
 15 extent they are interpreted more broadly to encompass any systematic issues beyond these claims.

16 5. Respondent admits that the Petition is timely under 28 U.S.C. § 2244(d)(1).  
 17 Respondent admits that the Petition is not subject to any other procedural bar.

18 6. Respondent denies that Hernandez is entitled to federal habeas relief under 28 U.S.C. §  
 19 2254 because the state court decisions were not contrary to, or an unreasonable application of  
 20 clearly established federal law as determined by the United States Supreme Court, or based on an  
 21 unreasonable determination of the facts.

22 7. Respondent denies that Hernandez has a federally protected liberty interest in parole  
 23 and, therefore, alleges that he has not stated a federal question invoking this court's  
 24 jurisdiction. The Supreme Court has not clarified the methodology for determining whether a  
 25 state has created a federally protected liberty interest in parole. *See Greenholtz v. Inmates of*  
 26 *Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (liberty interest in conditional parole release  
 27 date created by unique structure and language of state parole statute); *Sandin v. Connor*, 515 U.S.  
 28 472, 484 (1995) (federal liberty interest in correctional setting created only when issue creates an

1 “atypical or significant hardship” compared with ordinary prison life); *Wilkinson v. Austin*, 545  
2 U.S. 209, 229 (2005) (*Sandin* abrogated *Greenholtz*’s methodology for establishing the liberty  
3 interest). California’s parole statute does not contain mandatory language giving rise to a  
4 protected liberty interest in parole under the mandatory-language approach announced in  
5 *Greenholtz*. *In re Dannenberg*, 34 Cal. 4th 1061, 1087 (2005) (California’s parole scheme is a  
6 two-step process that does not impose a mandatory duty to grant life inmates parole before a  
7 suitability finding). And continued confinement under an indeterminate life sentence does not  
8 impose an “atypical or significant hardship” under *Sandin* since a parole denial does not alter an  
9 inmate’s sentence, impose a new condition of confinement, or otherwise restrict his liberty while  
10 he serves his sentence. Thus, Respondent asserts that Hernandez does not have a federal liberty  
11 interest in parole under either *Greenholtz* or *Sandin*. Respondent acknowledges that in *Sass v.*  
12 *California Board of Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006) the Ninth Circuit held  
13 that California’s parole statute creates a federal liberty interest in parole under the mandatory-  
14 language analysis of *Greenholtz*, but preserves the argument, which is pending en banc in  
15 *Hayward v. Marshall*, 527 F.3d 797 (9th Cir. 2008).

16 8. Even if Hernandez has a federal liberty interest in parole, he received all due process to  
17 which he is entitled under clearly established federal law because he was provided with an  
18 opportunity to be heard and a statement of reasons for the Board’s decision. *Greenholtz*, 442  
19 U.S. at 16.

20 9. Respondent denies that the some-evidence test is clearly established federal law in the  
21 parole context.

22 10. Respondent denies that the Board’s 2006 decision violated Hernandez’s federal due  
23 process rights by failing to provide him with individualized consideration or that there was  
24 insufficient evidence. Respondent also denies that the decision was arbitrary and capricious.

25 11. Respondent denies that the Board is biased or that it has a no-parole policy for life-term  
26 inmates.

27 12. Respondent denies that the Board’s denial violated his equal protection rights.

28 13. Respondent denies that Hernandez is entitled to immediate release based on the

1 Board's regulatory matrices. Moreover, Respondent alleges that Hernandez fails to present a  
2 federal question when he contends that the state courts improperly applied or interpreted state  
3 law. Alleged errors in the application of state law are not cognizable in federal habeas corpus.  
4 *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1984).

5 14. Respondent submits that an evidentiary hearing is not necessary because the claims  
6 can be resolved on the existing state court record. *Baja v. Ducharme*, 187 F.3d 1075, 1078 (9th  
7 Cir. 1999).

8 15. Respondent denies that Hernandez is entitled to immediate release. Rather,  
9 Hernandez's remedy is limited to the process that is due, which is a new review by the Board  
10 comporting with due process. *See e.g. Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 984-85 (9th  
11 Cir. 2002) (a liberty interest in parole is limited by the Board's exercise of discretion, and a due  
12 process error does not entitle an inmate to a favorable parole decision).

13 16. Hernandez fails to state or establish any grounds for habeas corpus relief.

14 17. Except as expressly admitted in this Answer, Respondent denies the allegations of the  
15 Petition.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Hernandez claims that the Board's 2006 decision finding him unsuitable for parole violated  
4 his due process rights. But Hernandez merely alleges a disagreement with the Board's decision,  
5 and fails to establish that the state court decisions denying his due process claims were contrary  
6 to, or an unreasonable application of clearly established federal law as determined by the United  
7 States Supreme Court, or were based on an unreasonable determination of the facts. Moreover,  
8 Hernandez fails to articulate a basis for federal habeas relief as to his other claims. As such, his  
9 Petition should be denied.

10 **ARGUMENT**

11 **I.**

12 **HERNANDEZ HAS NOT SHOWN THAT HE IS ENTITLED TO RELIEF**  
13 **UNDER AEDPA.**

14 Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a federal court  
15 may not grant a writ of habeas corpus unless the state court's adjudication was either: 1)  
16 "contrary to, or involved an unreasonable application of, clearly established Federal law, as  
17 determined by the Supreme Court of the United States;" or 2) "based on an unreasonable  
18 determination of the facts in light of the evidence presented at the State Court proceeding."  
19 28 U.S.C. § 2254(d)(1-2) (2000). Hernandez has not demonstrated that he is entitled to relief  
20 under this standard.

21 **A. Hernandez Has Not Shown that the State Court Decisions Was**  
22 **Contrary to Clearly Established Federal Law.**

23 As a threshold matter, the Court must decide what, if any, "clearly established Federal law"  
24 applies. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). In making this determination, the Court  
25 may look only to the holdings of the United States Supreme Court governing at the time of the  
26 state court's adjudication. *Carey v. Musladin*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 649, 653 (2007) (quoting  
27 *Williams v. Taylor*, 529 U.S. 362 (2000)). The only case in which the Supreme Court has  
28 addressed the process due in state parole proceedings is *Greenholtz*. *Greenholtz*, 442 U.S. 1.

1 The Supreme Court there held that due process is satisfied when the state provides an inmate an  
 2 opportunity to be heard and a statement of the reasons for the parole decision. *Id.* at 16. “The  
 3 Constitution does not require more.” *Id.*<sup>1/</sup> No other Supreme Court holdings require more at a  
 4 parole hearing.

5 Hernandez does not contest that he received the *Greenholtz* protections. (*See generally*  
 6 *Pet.*) Because *Greenholtz* was satisfied and *Greenholtz* is the only Supreme Court authority  
 7 regarding an inmate’s due process rights during parole proceedings, the state court decision  
 8 upholding the Board’s decision was not contrary to clearly established federal law. Thus, the  
 9 Petition should be denied.

10 Although Hernandez alleges that the Board’s decision must be supported by some evidence,  
 11 there is no clearly established federal law applying this standard to parole decisions. The  
 12 Supreme Court has held that under AEDPA a test announced in one context is not clearly  
 13 established federal law when applied to another context. *Wright v. Van Patten*, \_\_\_ U.S. \_\_\_ 128  
 14 S. Ct. 743, 746-47 (2008); *Schriro v. Landrigan*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1933 (2007); *Musladin*,  
 15 127 S. Ct. at 652-54; *see also*, *Foote v. Del Papa*, 492 F.3d 1026, 1029 (9th Cir. 2007); *Nguyen*  
 16 *v. Garcia*, 477 F.3d 716, 718, 727 (9th Cir. 2007); *Crater v. Galaza*, 491 F.3d 1119, 1122 (9th  
 17 Cir. 2007). The Supreme Court developed the some-evidence standard in the context of a prison  
 18 disciplinary hearing, *Superintendent v. Hill*, 472 U.S. 445, 457 (1985), which is a fundamentally  
 19 different context than a parole proceeding. Because the tests and standards developed by the  
 20 Supreme Court in one context cannot be transferred to distinguishable factual circumstances for  
 21 AEDPA purposes, it is not appropriate to apply the some-evidence standard of judicial review to  
 22 parole decisions.

23 Thus, the Ninth Circuit’s application of the some-evidence standard to parole decisions is  
 24 improper under AEDPA. *See, e.g., Biggs v. Terhune*, 334 F.3d 910 (9th Cir. 2003); *Sass*, 461

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26 1. The Supreme Court has cited *Greenholtz* approvingly for the proposition that the “level  
 27 of process due for inmates being considered for release on parole includes an opportunity to be heard  
 28 and notice of any adverse decision” and noted that, although *Sandin* abrogated *Greenholtz*’s  
 methodology for establishing the liberty interest, *Greenholtz* remained “instructive for [its]  
 discussion of the appropriate level of procedural safeguards.” *Austin*, 545 U.S. at 229.

1 F.3d at 1128; *Irons v. Carey*, 505 F.3d 846, 851 (9th Cir. 2007). Moreover, AEDPA does not  
 2 permit relief based on circuit caselaw. *Crater*, 491 F.3d at 1123, 1126 (§ 2254(d)(1) renders  
 3 decisions by lower courts non-dispositive for habeas appeals); *Earp v. Ornoski*, 431 F.3d 1158,  
 4 1182 (9th Cir. 2005) (“Circuit court precedent is relevant only to the extent it clarifies what  
 5 constitutes clearly established law.” . . . “Circuit precedent derived from an extension of a  
 6 Supreme Court decision is not clearly established federal law as determined by the Supreme  
 7 Court.”); *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 2000). Therefore, the Ninth  
 8 Circuit’s use of the some-evidence standard is not clearly established federal law and is not  
 9 binding on this Court..

10 Similarly, Hernandez’s related claim that the Board’s reliance on the immutable factor of  
 11 his commitment offense violates due process finds no support in Supreme Court precedent.  
 12 Although the Ninth Circuit has suggested that this might amount to an additional due process  
 13 claim, *Biggs*, 334 F.3d at 917, because there is no clearly established federal law precluding  
 14 reliance on unchanging factors federal habeas relief is not available. 28 U.S.C. § 2254(d).

15 Moreover, Hernandez’s claim that the Board’s decision was arbitrary and capricious fails  
 16 because the Board and the state courts gave Hernandez individualized consideration and  
 17 evaluated the positive and negative factors in considering his eligibility for parole. (Ex. B.)

18 In sum, the only clearly established federal law setting forth the process due in the parole  
 19 context is *Greenholtz*. Hernandez does not allege that he failed to receive these protections.  
 20 Therefore Hernandez has not shown that the state court decisions denying habeas relief were  
 21 contrary to clearly established federal law.

22 **B. Hernandez Has Not Shown that the State Courts Unreasonably**  
 23 **Applied Clearly Established Federal Law.**

24 Habeas relief may only be granted based on AEDPA’s unreasonable-application clause  
 25 where the state court identifies the correct governing legal rule from Supreme Court cases but  
 26 unreasonably applies it to the facts of the particular state case. *Williams*, 529 U.S. at 406. The  
 27 petitioner must do more than merely establish that the state court was wrong or erroneous. *Id.* at  
 28 410; *Lockyer*, 538 U.S. at 75. Respondent recognizes that the Ninth Circuit applies the some-

evidence standard as clearly established federal law, but even accepting that premise, Hernandez is not entitled to federal habeas relief. Indeed, the California Supreme Court has adopted *Hill*'s some-evidence test as the judicial standard to be used in evaluating parole decisions, *In re Rosenkrantz*, 29 Cal. 4th 616 (2002), and Hernandez has not shown that the state courts unreasonably applied the standard.

Here, the superior court provided Hernandez with individualized consideration regarding his suitability for parole and issued a reasoned decision finding that the facts of Hernandez's commitment offense were some evidence to support denying him parole. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991) (federal court looks to the last reasoned state court decision as the basis for the state court judgment); (Ex. B.)

Although Hernandez invites the Court to re-examine the facts of his case and re-weigh the evidence presented to the Board, there is no Supreme Court law permitting this degree of judicial intrusion. Indeed, the Supreme Court has recognized the difficult and sensitive task faced by the Board in evaluating the advisability of parole release. *Greenholtz*, 442 U.S. at 9-10. Thus, contrary to Hernandez's belief that he should be paroled based on the evidence in support of his parole (*see generally*, Pet.), the Supreme Court has stated that in parole release, there is no set of facts which, if shown, mandate a decision favorable to the inmate. *Id.*

Thus, the state court reasonably applied the minimal some-evidence test. *Hill*, 472 U.S. at 457.

**C. Hernandez Has Not Shown that the State Court Decisions Were Based on an Unreasonable Determination of the Facts.**

Under § 2254(d)(2), habeas corpus can not be granted unless the state courts' decisions were based on an unreasonable determination of the facts in light of the evidence presented in the state court. The state court's factual determinations are presumed to be correct, and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Although Hernandez alleges that the Board's decision is not supported by the evidence, he does not show that the state court made factual errors. The superior court provided Hernandez

1 with individualized consideration and concluded that there was some evidence to support the  
 2 Board's findings that the crime was committed in an especially heinous, atrocious, cruel manner,  
 3 and that multiple victims were attacked in that Hernandez shot and killed one victim, and then  
 4 shot two additional victims while emptying his gun. (Ex. B.)

5 Thus, for the foregoing reasons, Hernandez has not alleged by clear and convincing  
 6 evidence that the factual determinations are incorrect. Hernandez simply disagrees with the  
 7 weight the Board assigned to the evidence. This disagreement does not entitle Hernandez to  
 8 federal habeas relief.

## 9 II.

### 10 **HERNANDEZ HAS NOT SHOWN THAT HE IS ENTITLED TO** 11 **RELEASE UNDER THE BOARD'S REGULATORY MATRICES.**

12 Hernandez wrongly alleges that the Board's regulatory matrices entitle him to immediate  
 13 release. Hernandez's claim fails to implicate a federal claim because it is based on his  
 14 construction of the state statutes and regulations regarding the manner in which the parole  
 15 authority determines suitability for parole. Accordingly, his claim is predicated on state law and  
 16 not cognizable in federal habeas corpus. 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21  
 17 (1975); *Gutierrez v. Griggs*, 695 F.2d 1195, 1197-98 (1983). Moreover, even if Hernandez is  
 18 alleging that the state court erroneously rejected these claims, a federal court may not challenge a  
 19 state court's interpretation or application of state law, *Middleton v. Cupp*, 768 F.2d 1083, 1085  
 20 (9th Cir. 1985), or grant relief "on the basis of a perceived error of state law." *Pulley v. Harris*,  
 21 465 U.S. 37, 41 (1984). Accordingly, the Petition should be denied as to this claim.

22 Hernandez's claim also fails because there is no United States Supreme Court law  
 23 mandating that a release date be calculated before an inmate is found suitable for parole. Indeed,  
 24 while the Board's regulations set forth a matrix of factors used in setting a parole date (Cal. Code  
 25 Regs., tit. 15, § 2402), they also specify that the matrix is invoked only after a life inmate is  
 26 "found suitable for parole." (*Id.* at § 2402 (a); *see also id.* at § 2281 (a).) Here, the state courts  
 27 reasonably determined the facts in light of the evidence presented in determining the Board's  
 28 decision was supported by some evidence. (Ex. B.) Accordingly, Hernandez cannot prove that

1 the state courts acted contrary to United States Supreme Court law or unreasonably determined  
2 the facts in light of the evidence presented with respect to this claim.

3 **III.**

4 **HERNANDEZ HAS NOT SHOWN THAT THE BOARD HAS A**  
5 **NO-PAROLE POLICY IN DENYING HIM PAROLE.**

6 The petitioner bears the burden of proving his allegations in a habeas corpus proceeding.  
7 *See Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938). Here, Hernandez has not shown any  
8 evidence that the Board was biased in denying him parole or that his parole denial was based on a  
9 no-parole policy. Hernandez's general allegations are insufficient to prove that the Board was  
10 biased or that it has a no-parole policy. Thus, because Hernandez fails to state a claim for federal  
11 habeas relief, the petition must be denied.

12 **IV.**

13 **HERNANDEZ HAS NOT SHOWN THAT THE BOARD'S DENIAL**  
14 **VIOLATED HIS EQUAL PROTECTION RIGHTS.**

15 Hernandez fails to prove that the Board's parole denial violated his equal protection  
16 rights. Indeed, the state courts provided Hernandez with individualized consideration regarding  
17 his suitability for parole and concluded that there was some evidence in the record supporting the  
18 Board's decision to deny parole. (Ex. B.) Thus, Hernandez fails to state a claim for federal  
19 habeas relief and his Petition should be denied.

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**CONCLUSION**

Hernandez has not demonstrated that the state court decisions denying habeas relief were contrary to, or an unreasonable application of, United States Supreme Court authority, or based on an unreasonable determination of the facts. Thus, the Petition should be denied.

Dated: July 11, 2008

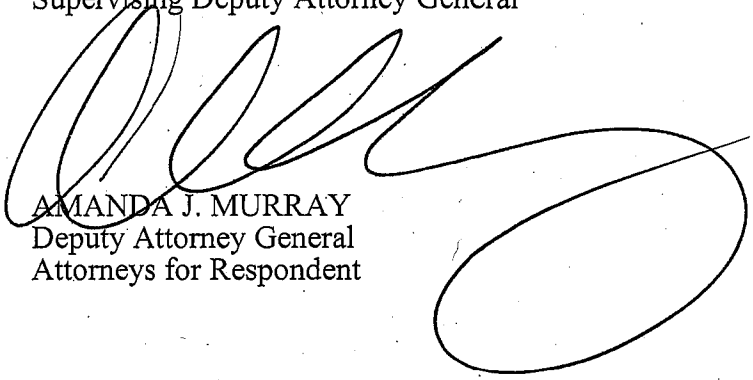
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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **Hernandez v. Curry**

No.: **C08-2278 JSW**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **July 14, 2008**, I served the attached

**ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS;  
MEMORANDUM OF POINTS AND AUTHORITIES**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**Peter Hernandez, C-03015  
Correctional Training Facility  
P.O. Box 689  
Soledad, CA 93960-0686  
IN PRO PER**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 14, 2008**, at San Francisco, California.

M.M Argarin  
Declarant

*M.M. Argarin*  
Signature

# **EXHIBIT A**

## **Part 1 of 2**

MC-275

Name Peter Hernandez  
 Address P.O. Box 689/F-237-L  
Correctional Training Facility  
Soledad, CA 93960-0689  
 CDC or ID Number C-03015

## LOS ANGELES COUNTY SUPERIOR COURT

(Court)

## PETITION FOR WRIT OF HABEAS CORPUS

**PETER HERNANDEZ,**

Petitioner

vs.

No. \_\_\_\_\_

(To be supplied by the Clerk of the Court)

**B. CURRY, Warden, et al.,**

Respondent

## INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Page one of six

## 6. GROUND FOR RELIEF

**Ground 1:** State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

PETITIONER'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WERE VIOLATED BY RESPONDENTS WHEN THEY DENIED TO HIM THE INDIVIDUALIZED CONSIDERATIONS MANDATED AND REQUIRED BY STATUTORY AUTHORITIES AND ALL THE CLEARLY ESTABLISHED FEDERAL LAWS

## a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who did exactly what to violate your rights at what time (when) or place (where).* (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

In August of 1988 and again in January of 1990, Peter Hernandez, (Petitioner), was found suitable for parole. Those Grants were subsequently reversed and are attached as Exhibit "A".

On July 13, 2006, Petitioner appeared before the Board of Parole Hearings (BPH) for his 13th subsequent hearing (14th overall), during which Mr. J. Davis was Presiding Commissioner and Mr. D. Smith was Deputy Commissioner. A copy of the Hearing transcript is attached hereto as Exhibit "B", and incorporated by reference to bolster a claim of a "no parole" policy and/or practice which has been found to be patently unconstitutional by numerous state and federal courts.

Petitioner was represented by Ms. K. Rutledge. A staff psychologist, Dr. E.W. Hewchuk, Ph.D., testified utilizing a filed Report dated: 7-23-04, that in his opinion Petitioner is NOT a risk of CURRENT (continued on attached pages).

## b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

(SEE ATTACHED POINTS AND AUTHORITIES)

This petition concerns:

☐ A conviction☒ Parole☐ A sentence☐ Credits☐ Jail or prison conditions☐ Prison discipline☒ Other (specify): state and federal denial of due process and equal protection1. Your name: Peter Hernandez2. Where are you incarcerated? Correctional Training Facility, Soledad, CA 939603. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

Homicide of the first degree, Assault w/intent to commit murder, firearm useb. Penal or other code sections: §§ 187, 217, 12022.5, 1203.06(a)(1) [under P.C. §1168]c. Name and location of sentencing or committing court: L.A. County Superior Court,  
111 N. Hill St., Los Angeles, CA 90012-3014d. Case number: A-334928e. Date convicted or committed: Mar. 9, 1979f. Date sentenced: Mar. 15, 1979g. Length of sentence: Seven (7) years to Lifeh. When do you expect to be released? Unknown, M.E.P.D.: 9-3-1985i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:Mr. Kenneth Cotton, L.A. County Public Defender,

4. What was the LAST plea you entered? (check one)

☒ Not guilty ☐ Guilty ☐ Nolo Contendere ☐ Other: \_\_\_\_\_

5. If you pleaded not guilty, what kind of trial did you have?

☒ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

## 6. GROUNDS FOR RELIEF

**Ground 1:** State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

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(SEE ATTACHED POINTS AND AUTHORITIES)

(continued from previous page):

danger to the public safety. A copy of that Report and Reports from 2004, 2002, 1999 and 1997 are attached as Exhibit "C". A copy of the 2006 Correctional Counselor Level I report was prepared and filed but not cited to and is attached hereto as Exhibit "D".

Copies of the 2005 and 2003 Decisions denying parole are attached as Exhibit "E" and are clearly anecdotal evidence to further advance the allegation of a "no parole" policy and/or practice that has been held to be unconstitutional as well as illegal by all courts that have ruled on the subject matter. With the Court's leave, Petitioner respectfully requests that this anecdotal evidence be incorporated to this pleading.

Also present at the hearing was Mr. P. Turley, deputy district attorney for Los Angeles county, parole division.

California's parole statutes and regulations bestow on life prisoners a liberty interest in parole protected by due process. McQuillen v. Duncan (9<sup>th</sup> Cir. 2002) 306 F.3d 895, 901-903; In re Rosenkrantz<sup>1</sup> (2002) 29 Cal.4<sup>th</sup> 616, 661 [Rosenkrantz V]. Petitioner's liberty interest required the BPH panel to find him suitable for parole and set his prison term and a parole date because, when his MEPD lapsed, his parole was evaluated to no longer pose an unreasonable risk of danger to society or public safety. (Penal Code (PC) §3041(a); 15 California Code of Regulations (CCR) §§ 2280, 2281(a).)

In some cases, a lifer who otherwise qualifies for parole may be found unsuitable for and denied parole if the commitment offense was especially egregious when compared to other instances of the same offense. Such cases, however, are *exceptions*, not per the rule. Accordingly, the conduct of a to-life sentenced inmate who committed first degree murder **must** be especially violent when compared to that of other first-degree murderers for parole to be denied on the basis of the offense in the case of an otherwise qualified inmate. However, the offense cannot serve as a basis for denying parole interminably. In re Ramirez (2001) 94 Cal.App.4<sup>th</sup> 549, 569-570; Rosenkrantz II, 658; (cf: Biggs v. Terhune (9<sup>th</sup> Cir. 2003) 34

<sup>1</sup> There have seven (7) "Rosenkrantz" decisions: People v. Rosenkrantz (1988) 198 Cal.App.3d 1187; In re Rosenkrantz (2000) 80 Cal.App.4<sup>th</sup> 409; Davis v. Superior Court (2-22-01, B146421 [non-pub.]; In re Rosenkrantz (2002) 95 Cal.App.4<sup>th</sup> 358; In re Rosenkrantz (2002) 29 Cal.4<sup>th</sup> 616; In re Rosenkrantz L.A. County Sup.Ct. no. BH003529, filed 6-26-2006; Rosenkrantz v. Marshall (2006) 444 F.Supp.2d 1063.

1 F.3d 910); Irons v. Warden (E.D. Cal. 2005) 358 F.Supp.2d 936; Martin v. Marshall (N.D. Cal. 2006) 431  
 2 F.Supp.2d 1038 (Martin I); In re Rosenkrantz (C.D. Cal. 2006) 444 F.Supp.2d 1063, 1081 [Rosenkrantz VII].

3 Substantive due process requires that the grounds set forth by a BPH panel for its decision must be  
 4 supported by at least some credible, relevant evidence in the record. The panel was required to base its  
 5 findings on a weighing of all relevant, reliable evidence. (15 CCR § 2281(b); In re Minnis (1972) 7 Cal.3d  
 6 639, 646; In re Rosenkrantz (2000) 80 Cal.App.4<sup>th</sup> 409, 424-427 (Rosenkrantz I); Rosenkrantz II, 655;  
 7 Ramirez, supra, 566. The "some evidence" standard is satisfied if there is reliable evidence in the record that  
 8 could support the conclusion reached. Powell v. Gomez (9<sup>th</sup> Cir. 1994) 33 F.3d 39, 40; Cato v. Rushen (9<sup>th</sup>  
 9 Cir. 1987) 824 F.2d 703, 705. And federal due process requires *substantial* evidence having indicia of  
 10 reliability Jancsek v. Oregon Bd. Of Parole (9<sup>th</sup> Cir. 1987) 833 F.2d 1389, 1390; In re Powell (1988) 45  
 11 Cal.3d 894, 904; In re Rosenkrantz II, 658; McQuillen, supra, 306; Biggs, supra, 915; Caswell v. Calderon  
 12 (9<sup>th</sup> Cir.2004) 363 F.3d 832, 839.

13 Black's Law Dictionary 5<sup>th</sup> Ed. 1979 defines SUBSTANTIAL EVIDENCE as follows: "Such  
 14 evidence that a reasonable mind might accept as adequate to support a conclusion. *It is that*  
 15 *quality of evidence necessary for a court to affirm a decision of an administrative board.*  
 (Black's p. 1281, citing State v. Green (1974) 544 P. 2d 356, 362. Emphasis added.)

16 The Due Process clause of the Fourteenth Amendment prohibits state action that deprives a  
 17 person of life, liberty, or property without due process of law. A person alleging a due process violation  
 18 must first demonstrate that he or she was deprived of a liberty or property interest protected by the Due  
 19 Process Clause, and then show that the procedures that led to the deprivation were constitutionally  
 20 insufficient. Kentucky Dept. of Corrections v. Thompson (1989) 490 U.S. 454; McQuillen, supra, 900.

21 In the parole context, a prisoner alleging a due process claim must demonstrate the existence of a  
 22 protected liberty interest in parole, and the denial of one or more of the procedural protections that must be  
 23 afforded when a prisoner has a liberty interest in parole. The Supreme Court held in 1979, and reiterated in  
 24 1987, that "a state's statutory scheme, if it uses mandatory language, creates a presumption that parole  
 25 ~~release will be granted when or unless certain designated findings are made, and thereby gives rise to a~~  
 26 constitutional liberty interest." McQuillen, supra, 901 (citing Greenholtz v. Nebraska Penal Inmates (1979)  
 27 442 U.S. 1, 7 and Board of Pardons v. Allen (1987) 482 U.S. 369, 373. Because no evidence supported the  
 28 panel member's finding that Petitioner's parole poses an "unreasonable risk of danger to society" or to

1 "public safety," and the finding was inapposite to the record, parole denial on that basis subverted due  
2 process.

3 The reason stated by the panel for finding Petitioner unsuitable was BPH's boilerplate statement that  
4 his parole "would pose an unreasonable risk of danger to society or a threat to public safety." (Exhibit "A", p.  
5 70,) the sole ground set forth by the panel in support of its Decision to AGAIN, for at least the fourteenth  
6 (14<sup>th</sup>) time, deny suitability and dismiss his warrant of parole which is tremendously long overdue!

7 (His M.E.P.D. was on the 9<sup>th</sup> of September, 1985!!)

8 Parole denial based on the "unreasonable risk" subterfuge abandoned principles of independence  
9 and abrogated due process because it is supported by **NO EVIDENCE** whatsoever. **All** of the competent,  
10 professionally-sanctioned evidence that addresses Petitioner's current **and** future dangerousness, parole  
11 risk, etc., found it to be "low," "below average," or "no more than the average citizen," nor has it been for over  
12 a score years. (See Exhibit "C", throughout, Exhibit "A", at pp. 45-46.)

13 Utilizing the legal precedent established as the focal criteria, all relevant, reliable evidence in  
14 Petitioner's records that addresses his dangerousness and parole "risk" all assess these factors to be low,  
15 and because not a scintilla of reliable, relevant evidence supports the panel's flawed findings, the sole  
16 relevant reason for finding him unsuitable for parole sensibly suggests this was an illegitimate (ongoing)  
17 basis for denial. Martin v. Marshall (N.D. Cal. 2006) 448 F.Supp.2d 1143, (Martin II), et al.

18 In Martin, supra, Justice Patel found NO justification for the panel's boilerplate lack of individual  
19 consideration and in her July 21, 2006 Memorandum and Order she stated:

20 "In light of the Board's apparent abandonment of its independent role

21 —**which occurred AFTER Governor Schwarzenegger took office,**

22 *the court finds that a remand would indeed be futile.*" There can be no question but that the  
23 implication here is exactly what it means: NO INDEPENDENT PAROLE DECISION BY THE WILSON,  
24 DAVIS, OR SCHWARZENEGGER regimes for this Petitioner. *Id.* at p. 1144. (Emphasis added.)

25 In Rosenkrantz II, supra, at p. 655, the Supreme Court explained that parole release decisions  
26 "entail the [BPH]'s attempt to predict by subjective analysis whether the inmate will be able to live in society  
27 without committing additional antisocial acts."

28 Such a prediction requires analysis of individualized factors on a case-by-case basis and the BPH's

1 discretion in that regard is almost but NOT unlimited. Further, regardless of the tenet that the BPH's  
 2 discretion is exceedingly broad, it is circumscribed by the requirements of procedural due process.  
 3 (Rosenkrantz, *id.*, Calif. Const. article I, § 7(a), and statutory directives.)

4 Absent reliable evidence of the presence of unsuitability factors, there must be some relevant,  
 5 reliable evidence that a petitioner is otherwise unsuitable for parole, such as by his having failed to meet the  
 6 suitability criteria under 15 CCR § 2402, subd. (d); §§ 1-4, 6-9. And, while the BPH has exceedingly broad  
 7 discretion in its parole decisions, the Findings must reflect "*an individualized consideration of the specified*  
 8 *criteria and cannot be arbitrary or capricious.*" Rosenkrantz V, *supra*, 677; "[t]he liberty interest is created,  
 9 not upon the grant of a parole date, but upon the incarceration of the inmate." Biggs, *supra*, p. 914.

10 The failure to properly consider the post-incarceration factors highlights the inherent  
 11 misunderstanding and application of the "some evidence" standard and triggers the required scope of  
 12 judicial review of the federal questions presented here.

13 There are two sets of parole criteria regulations, not one. 15 CCR §§ 2402, subd. (c) [Circumstances  
 14 Tending To Show Unsuitability], and 2402 subd. (d) [Circumstances Tending To Show Suitability]. It appears  
 15 that the BPH's focused emphasis has been on, and remains on, subdivision (c), with little or no regard given  
 16 to subdivision (d). Petitioner asserts, as a matter of statutory construction, the "public safety" concern in PC  
 17 § 3041(b), demands an equal (or neutral) emphasis at the outset of a panel's deliberations AND on its  
 18 Findings under both sets of criteria and any balanced and reasonable interpretation should compel this  
 19 approach throughout the entire process due any inmate and to do so would virtually assure a Finding of  
 20 suitability.

21 Factors TENDING to show suitability or unsuitability must be weighed and balanced within the  
 22 parameters of a standard of proof. Without this critical, reliable component, the process is inherently  
 23 arbitrary, capricious, and defective. This standardless analysis would vitiate the individualized consideration  
 24 held appropriate in Rosenkrantz II. The crux of the matter is that of a standard of proof with indicia of  
 25 reliability as set forth below and reinforced with significant legal precedent.

26 The "some evidence" standard is NOT the sole standard of evidence to be applied to the BPH's  
 27 decisions. It is only one aspect of *judicial* review employed by a habeas court. Edwards v. Balisok (1997)  
 28 520 U.S. 640, 647. And, if the Rosenkrantz II decision implies, as it does, that the "some evidence" standard

1 should be applied to the BPH Findings, then this is a clear and unreasonable application of well-established  
 2 federal Constitutional law set forth by the High Court. Nothing in Superintendent v. Hill (1985) (Hill) 472 U.S.  
 3 445, 456, implies that it IS A STANDARD OF EVIDENCE to be applied by any agency, board, or executive  
 4 body outside a disciplinary committee within an exigent-circumstances prison setting that has no pressing  
 5 need for more formal evidentiary standards or anything warranting standardless precedents

6 What IS implied by the Rosenkrantz II court, when it held that a habeas court can't reverse a  
 7 decision denying parole even if it determines that the evidence overwhelmingly preponderates towards a  
 8 finding of suitability is completely unreasonable because it prevents effective habeas relief from an arbitrary  
 9 and capricious decision, and worse, stymies effective judicial review. This court is not obliged nor compelled  
 10 to defer to a state decision misapplying federal constitutional principles. Hubbart v. Knapp (9<sup>th</sup> Cir. 2004) 379  
 11 F.3d 773, 780; referencing Mullaney v. Wilbur 421 U.S. 684, 691; see also Peltier v. Wright (9<sup>th</sup> Cir. 1994) 15  
 12 F.3d 860, 862.

13 In Oxborrow v. Eikenberry (9<sup>th</sup> Cir. 1989) 877 F.2d 1395, 1399, the Circuit held that: "Our deference  
 14 to the [state court] is suspended only upon a finding that the court's interpretation of [state law] is untenable  
 15 or amounts to a subterfuge to avoid federal review of a constitutional violation." Thus, it is petitioner's  
 16 contention that respondents seek to avoid federal review by asserting that the "some evidence" standard 1)  
 17 is applied by the BPH and/or, 2) limits judicial review ONLY to the BPH's ultimate decision and not to a  
 18 finding of a defective pre-Decision process.

19 If Petitioner were the beneficiary of an individualized consideration utilizing real evidence with  
 20 reliable, articulable proof, it would have logically flowed that he is now MORE suitable than his previous  
 21 hearings wherein he was found suitable. (Exhibit "A"). All those laudatory words at his Hearing would have  
 22 had a consistent ring of truth to them in that he has progressed towards a more-suitable mien, not the  
 23 reverse. This highly illegal "boilerplate" denial now rises to the level of a federal due process violation. Biggs,  
 24 supra, 916-917; Martin, supra, 1046-1048.

25 The High Court in Greenholtz (at p. 7) Allen (at p. 373) , supra, established that:

26 "While there is no constitutional or inherent right of a convicted person to be conditionally  
 27 released before the expiration of a valid sentence, a state's statutory scheme, if it uses  
 28 mandatory language, creates a presumption that parole release will be granted when or  
 unless certain designated findings are made, and thereby gives rise to a constitutional  
 liberty interest." (citing McQuillen, supra, at 901.)

1 In the absence of any evidence in the record supporting the BPH's decision, remanding the case  
 2 back to be reheard is a futile act, and the appropriate remedy is release of the Petitioner. McQuillen II,  
 3 supra, p. 1015-15; Martin II, supra, 1144-45; Rosenkrantz VII, supra, 1087.

4 A petitioner is entitled to "something more than mere pro forma consideration.", e.g. meaningful  
 5 individual consideration. Not a sham hearing using rote words and repeating boilerplate from a pre-printed  
 6 form. The only mandate "normally" being followed under P.C. § 3041 (a), is a multi-year denial under § 3041  
 7 (b) to "swallow" the due process required under the 14<sup>th</sup> Amendment, an ingestion violating the equal  
 8 protection guarantees and abridges Petitioner's civil rights under both state and federal Constitution's  
 9 proscription against this tactic for all similarly-situated inmates. In re Sturm (1974) 11 Cal.3d 258, 268;  
 10 Ramirez, supra, at 570; Rosenkrantz V, at pp. 658, 683:

11 "Judicial oversight must be extensive enough to protect the limited right of parole applicants  
 12 "to be free from an arbitrary parole decision ... and to something more than mere pro forma  
 13 consideration." [citation omitted] The courts may properly determine whether the [BPH]'s  
 14 handling of parole applications is consistent with the parole policies established by the  
 15 Legislature. [ ] while courts must give great weight to the [BPH]'s interpretation of the parole  
 16 statutes and regulations, final responsibility for interpreting the law rests with the courts. [ ]  
 17 Courts must not second-guess the [BPH]'s evidentiary findings [ ] However, it is the proper  
 18 function of judicial review to ensure that the [BPH] has honored in a "practical sense" the  
 19 applicant's right to "due consideration." [ ] Ramirez supra, at 564.

20 Since it is clear that parole should be the rule and not the exception, a moderate or average risk  
 21 cannot be construed as "unreasonable." Were an average risk grounds for parole denial, then the exception  
 22 would "operate so as to swallow the rule that parole is 'normally' to be granted."  
 23

24 "All violent crime demonstrates the perpetrator's potential for posing a grave risk to public  
 25 safety ... {However} the [BPH] "shall normally set a release date." [citation omitted] The  
 26 [BPH]'s authority to make an exception ... should not operate to swallow the rule that parole  
 27 is 'normally' to be granted. ... Therefore, a life term offense must be *particularly egregious* to  
 28 justify the denial of a parole date. In order to comply with the parole policy established by  
 the Legislature in P.C. § 3041, the [BPH] must weigh the inmate's criminal conduct not  
 against ordinary social norms, but against other instances of the same crime or crimes."  
 (Ramirez, supra, at 570, disapproved on other grounds, Emphasis added as usual in  
 published cases.)

29 The applicability of this standard to the review of decisions applies and Petitioner's right to  
 30 ~~due consideration does not appear to have been honored in any practical sense by the panel in this case~~  
 31 and their Decision is facially and legally deficient. In the instant case the BPH made no effort to comply with  
 32 the controlling rules and seems to have merely stated its "predetermined conclusion." (See: In re Caswell

1 (2001) 94 Cal.App.4th 1017, 1030.)

2 In In re Smith (2003) (Smith II) 114 Cal.App.4th 343, 369, the Sixth District Court of Appeals found  
3 that there was not some evidence that Smith's crime was more callous than the average for this type of  
4 crime. There was nothing to "distinguish th[e] crime from other [serious] murders [involving a gun] ... the  
5 record provides no reasonable grounds to reject, or even challenge, the findings and conclusions of the  
6 psychologist and counselor[s] concerning [his] dangerousness."

7 Surely the same must appear to be true here. (See Exhibits "C" and 2004 Correctional Counselor's  
8 Report, Exhibit "F", attached.) The Second District Court of Appeals, in the case of another life-term inmate  
9 named Smith similarly found no evidence to support a parole denial based on the commitment offense. In re  
10 Smith (2003) (Smith I) 109 Cal.App.4th 489.

11 Compare In re Scott (2004) 119 Cal.App.4th 871, 876-877 [Scott I], where the First District reversed  
12 the BPH's standard statement of reliance on the gravity of the crime because in truth, "the relevant evidence  
13 show[ed] no more callous disregard for human suffering than is shown by most [ ] murder offenses.  
14 (Governor's rescission of Scott's parole unanimously reversed on 10-18-05, see: In re Scott 133 Cal.App.4th  
15 538, Scott II.)

16 On 5-18-05, in Coleman v. BPT (E.D. Cal. No. 97-0783), Honorable Judge L. Karlton  
17 adopted the Findings and Recommendations IN FULL. There, it was found that ex-governors Davis and  
18 Wilson (and NOW Governor Schwarzenegger, too. See infra at p. C), had/have panels with a sub rosa "no  
19 parole" policy and were/are carrying it out. Martin I supra, 1048-49, Martin II, supra, 1144; see Coleman and  
20 Final Order, attached as Exhibit "G".

21 It is beyond debate that neither a state agency interpreting an enabling statute nor any court of the  
22 state can construe a statute contrary to Legislative intent or the ordinary meaning of the words used in a  
23 statute. Our Court, in the entire history of the statute, has never construed it with any adequacy according to  
24 the plain meaning to create guidance and instill compliance by both the BPH panels and those who serve  
25 the governors otherwise.

26 Instead, this lack of judicial construction has led to the many years of overwhelming denials that DO  
27 NOT reflect in any clear way the presumptions of § 3041. Nor does it reflect instruction as to what the  
28 agency's burden of proof is or the legal significance of relevant, reliable, or material evidence. This lack of

1 judicial guidance has left unfettered discretion in the hands of lay appointees to determine the legal import of  
 2 evidence (or lack thereof) although these persons are arguably unqualified by a dearth of professional  
 3 standing to make these determinations upon which a federal liberty interest depends.

4 Determining the legality and weight and of evidence requires some specific legal training in  
 5 evidentiary law; not by lay persons, and which lack of training is visibly evident in the incongruously  
 6 inapposite findings thus made. (McQuillen I, supra, 907-912; Rosenkrantz II, supra, 680; Rosenkrantz I,  
 7 supra, 424-426; Smith II, supra, 361; Smith I, supra, 501-506.) These are only a few of the published cases  
 8 but unpublished absurdities exponentially abound!

9 The Sixth district held for the proposition in Smith II at 361 that "[t]he weight given the specified  
 10 factors relevant to parole suitability lies within the discretion of the BP[H]."; a court's determination "of  
 11 whether the *preponderance of the evidence* supports a finding of suitability is irrelevant." (Emphasis added.)  
 12 This is the first time a published decision on the BPH has even mentioned a burden of proof. This reference  
 13 infers the BPH must honor this evidentiary standard as faithfully to the letter as legally possible.

14 Yet there is no settled bright line rule for a court to determine if the BPH has met that standard. Just  
 15 the opposite, in fact, since Smith II strongly suggests that even if a reviewing court finds the agency did not  
 16 meet the standard, an allegation of "some evidence" is sufficient to automatically require judicial deference.

17 The Third District Court of Appeals stated the following as fact:

18 "It is without doubt that a blanket no-parole policy would be contrary to the law, which  
 19 contemplates that persons convicted of murder without special circumstances may eventually  
 20 become suitable for parole and that, when eligible, they should be considered on an  
 21 individualized basis. Thus, blanket policies have long been deemed to be improper. ¶ In  
 22 Roberts v. Duffy (1914) 167 Cal. 629, a decision that predates the enactment of our state's  
 23 old indeterminate sentencing law, the Court condemned a blanket parole policy that was  
 24 contrary to the statutory parole scheme then in place. It appeared that the statutory law  
 25 allowed a prisoner to apply for parole after serving ONE YEAR but that, **contrary to the**  
 26 **statute, the parole authority adopted a rule precluding application until one-half the**  
 27 **sentence was served.**

28 The Court held that, "while the prisoner had no right to apply to release on parole at  
 any time, **he was entitled to apply** and have his application duly considered on an  
individualized basis." Id. at 640-641.

(Does this sound familiar? Emphasis added to original citation.)

"With respect to persons sentenced to indeterminate terms, the purpose of punishment is  
 satisfied by the requirement of service of a minimum period before eligibility for parole and,  
 when suitable for parole, by determination of a release date **in a manner that will provide**

1 UNIFORM TERMS for offenses of similar gravity and magnitude with respect to their threat to  
2 the public." (P.C. §§ 3041, 3041(a), 3041.5, citing In re Morra (2002) 102 Cal.App.4<sup>th</sup> 280,  
291-292.)

3 The arbitrary or capricious misapplication of statutory law violates both state and federal due  
4 process. Hill, supra, at p. 428; Gordon v. Duran (9<sup>th</sup> Cir. 1990) 895 F.2d 610, 613; In re Edsel P. (1985) 165  
5 Cal.App.3d 763, 779. "The touchstone of due process is protection of the individual against [the] arbitrary  
6 action of government." Wolff v. McDonnell (1974) 418 U.S. 539, 558.)

7 These principles apply in equal force to incarcerated prisoners. (In re Jones (1962) 57 Cal.2d 860,  
8 862; ["a convicted felon, although civilly dead, is nevertheless a 'person' entitled to protection of the 14<sup>th</sup>  
9 Amendment."]; In re Price (1979) 24 Cal.3d 448, 453 [acknowledging that P.C. § 2600 limits a prisoner's  
10 deprivation to only such rights "as is necessary in order to provide for the reasonable security of the  
11 institution in which he is confined."].)

12 In interpreting a prisoner's rights of substantive due process the High Court has held that a prisoner  
13 may derive a due process liberty interest from administrative regulations, as well as state law and the U.S.  
14 Constitution. Sandin v. Conner (1995) 515 U.S. 472, 484; Hewitt v. Helms 459 U.S. 460, 469, receded from  
15 on p. 484, fn. 5; Meachum v. Fano (1976) 427 U.S. 215, 226; Wolff, supra, at p. 557. In applying these  
16 standards here, the BPH violated Petitioner's right to constitutional due process but he is not challenging the  
17 BPH's right to conduct professional psychological assessments as the main focus of the parole evaluation  
18 process, but does challenge their "normal" practice of summarily dismissing and patently ignoring their own  
19 experts.

20 Predictions of future conduct necessarily relate to public safety concerns but Judge Karlton in Irons  
21 v. Warden (E.D. Cal. 2004) 358 F.Supp.2d 936 (9<sup>th</sup> Cir. Review pending, filed on 5-18-05, No. 05-15275),  
22 discussed this conundrum and noted that the propensity analysis thusly:

23 "To a point, it is true, the circumstances of the crime and motivation for it may indicate a  
24 petitioner's instability, cruelty, impulsiveness, violent tendencies and the like. However,  
25 after 15 or so years in the cauldron of prison life, not exactly an ideal therapeutic  
environment to say the least, and after repeated demonstrations that despite recognized  
hardships of prison, [petitioner] does not possess these attributes, the predictive ability of  
the circumstances of the crime is near-zero."<sup>2</sup>

26  
27 <sup>2</sup> "It is worth noting, as has our [Calif.] Supreme Court (People v. Murtishaw (1981) 29 Cal.3d 733, 768, disapproved on other grounds in People v. Boyd  
28 (1985) 38 Cal.3d 762, that a large number of legal and scientific authorities believe that, even where the passage of time is not a factor and the  
assessment is made by an expert, predictions of future dangerousness are exceedingly unreli- able. (See, e.g., Monahan, *Violence Risk Assessment:  
Scientific Validity and Evidentiary Admissibility*, 57 Wash. & Lee' L. Rev. 901 (2000); Otto, *On the Ability of Mental Health Professionals to 'Predict  
Dangerousness'*, 18 Law & Psychol. Rev. 43 (1994); Lidz, et al., *The Accuracy of Predictions of Violence to Others*, 269, Jour.Am.Med.Assn. 1007 (1993);  
Diamond, *The Psychiatric Prediction of Dangerousness*, 123 Pa.L.Rev. 439 (1974); Dershowitz, *The Law of Dangerousness: Some Fictions About*

(Irons, supra, at p. 947, fn. 2, this 'dicta' was also cited as Headnote #10 at p. 937; see additional discussion of "need for more therapy" used as a ruse to deny suitability at p. 948.)

P.C. § 3041(a) governs parole suitability determination processes and does not define more than one class of persons. The statute generalizes that its focus is "any prisoner" who is serving an indeterminate term. Through application, however, the agency's discrimination amongst the class serving indeterminate sentences is in violation of the right to equal protection ensconced in the Fourteenth Amendment. Equal protection is "[in essence] a direction that [a person] similarly situated should be treated alike." (*City of Cleburne v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 439, citing *Plyler v. Doe* (1982) 457 U.S. 202, 216, "To state a claim ... for violation of the Equal Protection Clause of the 14<sup>th</sup> Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Barren v. Harrington* (9<sup>th</sup> Cir. 1998) 152 F.3d 1193, 1194, cert. denied 525 U.S. 1154 (1999).)

Strict scrutiny, alternatively, is utilized if the government distributes benefits or burdens in a manner inconsistent with fundamental rights. (See *Sosna v. Iowa* (1975) 419 U.S. 393; *Shapiro v. Thompson* (1969) 394 U.S. 618.) The fundamental right here is the due process right to relevant, reliable evidence being considered when analyzing a right to release on parole. *McQuillen I*, supra, at 900; *McQuillen II*, supra, at 1012; *Martin I*, supra, at 1043: ("[T]he deferential 'some evidence' standard has outer limits. [citing *Coleman*, supra, with approval slip op. at 9] If it is established that a particular judgment was predetermined, then a prisoner's due process rights will have been violated even if there is 'some evidence' to support the decision. [See *Bakalis v. Golembeski* (7<sup>th</sup> Cir. 1994) 35 F.3d 318, 326] (a decision-making "body that has prejudged the outcome cannot render a decision that comports with due process. ... The California Supreme Court has explicitly stated that a blanket no-parole policy as to a certain category of prisoners is illegal. [*In re Minnis*; *In re Morral*] " ... Because petitioner cannot change the past, denying [P]etitioner parole based only on the facts surrounding the crime itself effectively changes his sentence ...

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*Predictions* (1970) 23 J. Legal Ed. 24. According to a Task Force of the American Psychiatric Assn., "[n]either psychiatrists nor anyone else have demonstrated an ability to predict future violence or dangerousness. (Am.Psych.Assn., Task Force Rpt. 8, *Clinical Aspect of the Violent Individual* (1974) at p. 28.) As our [Calif.] Supreme Court has also noted, "the same studies which proved the inaccuracy of psychiatric predictions [of dangerousness] have demonstrated BEYOND DISPUTE the no less disturbing manner in which such prophecies consistently err: they predict acts of violence which will not take place ('false positives', thus branding as 'dangerous' many persons who are in reality totally harmless. [citation.]" (*People v. Burnick* (1975) 14 Cal.3d 306, 327.) (all emphasis in original). (See: copy of Order denying Review, dated 11/30/05, Daily Journal 12/2/05, p. 13803, attached as Exhibit "B"). *Scott II*, supra, footnote #9.

1 into life imprisonment without the possibility of parole." Ibid. at 1046.) (cf. Martin II, supra, at 1144: "In sum,  
2 the Board appears to have capitulated to the blanket no-parole policy described by this court in its previous  
3 [Martin I] Order, abandoning its role as an independent assessor of petitioner's eligibility. This capitulation is  
4 particularly troubling in light of the Board' vigorous assertions of independence during the 2003 hearing."  
5 This Honorable Court should grant the writ and Order all appropriate relief including a complete discharge  
6 from custody and sanction full redress for Petitioner.

7  
8  
9 CONCLUSION

10 WHEREFORE, Petitioner respectfully submits that the writ should be granted in full and all available  
11 remedies leading to his immediate release from custody be Ordered at the earliest possible moment and  
12 forthwith. It is respectfully requested that an evidentiary hearing be Ordered as an alternative to the above  
13 should there be consideration of the "no parole" policy and/or practice by this previous administration.

7 Ground 2 or Ground \_\_\_\_\_ (if applicable):

PETITIONER'S FEDERAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTIONS WERE VIOLATED WHEN RESPONDENTS UTILIZED A LESSER STANDARD OF LEGAL PROOF REQUIRING EVIDENCE WITH SOME INDICIA OF RELIABILITY TO FIND THAT PETITIONER IS UNSUITABLE TO PAROLE AND IS THEREFORE AN UNREASONABLE RISK

a. Supporting facts:

Nowhere is there any codification that avers petitioners must prove his or her suitability. Only if an inmate is found unsuitable does evidence become citable. (See Dannenberg, at 1095; Rosenkrantz at 658, 683.) Evidence must be specific, articulable, and have "some indicia of reliability." Respondents have the burden of proof to demonstrate, in the Record, why an inmate is not suitable and a denial of more than one year requires that the BPH panel state for the Record why it isn't likely that petitioners would be found suitable any time sooner. There is a wholesale vitiation going on here.

Procedural safeguards require: a hearing one year prior to the MEPD, CCR §§2268(b)[2400 et seq.], 2270(d), (e), (f); PC §3041 (a), CDC v. Morales (1995) 115 S.Ct. 1597, 1600; service and prior examination of all material considered; representation if desired.

The one-year lead on a MEPD imparts that the Legislature intended that some inmates will be suitable at an initial hearing otherwise why would such a gratuitous mandate exist? Governor's-level review presumes a neutral, well-defined, professional body that will follow all the state and federal laws. Only this practice

b. Supporting cases, rules, or other authority:

(continued on attached pages)

(SEE ATTACHED POINTS AND AUTHORITIES)

1 Ground 2, continued:

2 would meet the constitutional burden under the discretionary methods  
3 needed to quickly resolve an uncertain matter.

4 The "some evidence" relied on to deny parole must be relevant  
5 and reliable in establishing Petitioner is a current, unreasonable  
6 threat to public safety and must not be grounded in an incomplete  
7 or unreasonable assessment of the relevant factors.

8 In explaining what the "some evidence" standard meant, the  
9 Court in In re Rosenkrantz (2002) 29 Cal.4th 616 at 677, stated  
10 that "[o]nly a modicum of evidence is required." On its face, this  
11 standard could thus be seen as remarkably broad--that a scintilla  
12 of evidence (or the BPH's assessment of it)--would be enough to  
13 completely immunize BPH decisions from judicial review. However,  
14 such a reading would effectively serve to nullify the Rosenkrantz  
15 court's holding rejecting the Executive's position that factual  
16 decisions rejecting parole were immune from examination by the courts  
17 and in point of fact were required.

18 A dissection of the "some evidence" standard itself--both  
19 conceptually and through a review of the application of the  
20 Rosenkrantz' standard (and its progeny)--makes clear that this is  
21 the meaningful standard. Properly understood, it strikes an  
22 appropriate balance between judicial deference to difficult BPH  
23 decisions and the protection of constitutional liberty interests.

24 The "some evidence" standard of review is laid out here:

---

25 "[W]e conclude that the judicial branch is authorized  
26 to review the factual basis of a decision of the [BPH]  
27 denying parole in order to ensure that the decision comports  
28 with the requirements of due process of law, but that  
in conducting such a review, the court may inquire only  
whether some evidence in the record before the [BPH] sup-  
ports the decision to deny parole, based upon the factors

1 specified by statute and regulation. Rosenkrantz, 658.  
 2 "[a]s long as the [BPH] decision reflects due consideration  
 3 of the specified factors as applied to the INDIVIDUAL  
 4 PRISONER in accordance with applicable legal standards,  
 the court's review is limited to ascertaining whether  
 there is some evidence in the record that supports the  
 [BPH] decision." Id. at 677. (emphasis added).

5 Thus, the inquiry into whether there is "some evidence" is  
 6 more complex than it might otherwise seem, as the standard MUST  
 7 be applied within the context of the statutory framework in which  
 8 it arises. This framework imposes at least 3 requirements on the  
 9 "some evidence" standard if it is used to deny parole.

10 First, the BPH must base their decisions only on evidence that  
 11 serves to establish that the inmate will or will not pose a  
 12 continuing, "unreasonable risk of danger to society if released from  
 13 prison." CCR, title 15, §2402(a), and PC §3041(b).

14 Second, the evidentiary basis for parole decisions must be  
 15 based on the factors specified in the regulations after  
 16 individualized considerations of all of the factors. Rosenkrantz  
 17 at 677 ("The precise manner in which the specified factors relevant  
 18 to parole suitability are considered and balanced lies within the  
 19 discretion of the [executive branch], but the decision must reflect  
 20 an individualized consideration of the specified criteria and CANNOT  
 21 BE ARBITRARY AND CAPRICIOUS."); see also In re Stanley (1976) 54  
 22 Cal.App.3d 1030, 1038 n.7 ("Other courts place more weight on the  
 23 prisoner's record of crime. We abstain from any argument over the  
 24 relative primacy of various parole factors. It is enough to say  
 25 that the Adult Authority must apply all the factors.") (citing In  
 26 re Minnis (1972) 7 Cal.3d 639). These factors naturally all relate  
 27 to whether the inmate poses a continuing, unreasonable risk of danger  
 28 to society if released from prison. (emphasis added).

1 Third, the evidence upon which the BPH relies must be relevant  
 2 and reliable. CCR §2402(b) ("All relevant, reliable information  
 3 available to the panel shall be considered in determining suitability  
 4 for parole.") (cf. CCR §§2402(d)(1-9).

5 In sum, a court examining parole decisions must determine  
 6 whether, after all consideration of all the factors enumerated in  
 7 the statute and regulations, the decision was based on: 1) some  
 8 evidence; 2) a reasonable consideration of all the factors specified  
 9 by the statutory guidelines; 3) evidence that is both relevant and  
 10 reliable; and 4) factual determinations that suggest an inmate poses  
 11 a CURRENT, UNREASONABLE THREAT TO PUBLIC SAFETY.

12 A review of the post-Rosenkrantz legal panorama reveals that  
 13 California courts of appeals and federal courts have routinely  
 14 applied the above boundaries and checkpoints of relevance,  
 15 reliability and reasonableness to the "some evidence" standard.  
 16 The California Supreme Court has so far utterly failed to establish  
 17 a brightline Plimsoll mark to define the full depth of the inquiry.

18 The courts continue to assess the reasonableness of the BPH's  
 19 interpretation of the facts and circumstances used to legally sus-  
 20 tain a finding of parole suitability denial. The court in In re  
 21 Van Houten (2004) 116 Cal.App.4th 339, 356, assessed whether the  
 22 BPH was reasonably able to conclude that there was some evidence  
 23 of the inmate's need of continuing therapy and her dangerousness  
 24 to the public. Though it found in the affirmative, the court took  
 25 a close look at whether the BPH "could reasonably conclude that  
 26 [her] defense, that Manson's influence overwhelmed [her], was  
 27 exaggerated such that she is fully responsible for the LaBianca  
 28 murders" and whether "[t]he BPH could infer with sufficient

1 reasonableness to satisfy a minimal 'some evidence' standard that  
 2 [she] is a danger to the public and in need of continued therapy  
 3 and programming." Her denial was affirmed with instructions.

4 Judicial inquiry into the stated reasons for parole denial  
 5 have their place and numerous state and federal courts--in a wide  
 6 range of contexts--have similarly held the judicial inquiry into  
 7 the reasonableness of BPH determinations and conclusions is  
 8 appropriate, even when such determinations and conclusions are  
 9 accorded broad deference. (See, e.g., In re Farley (2003) 109  
 10 Cal.App.4th 1356, 1361-2: "Judicial review of a CDC custody  
 11 determination is limited to determining whether the classification  
 12 decision is arbitrary, capricious, irrational, or an abuse of the  
 13 discretion granted those given the responsibility for operating  
 14 prisons. While we must uphold respondent's classification action  
 15 if it is supported by "some evidence" and we must afford great  
 16 deference to an administrative agency's expertise, where the agency's  
 17 interpretation of the regulation is clearly arbitrary or capricious  
 18 or has no basis, COURTS SHOULD NOT HESITATE TO REJECT IT."

19 Federal courts likewise require parole decisions to be  
 20 reasonable. As an example, in a parole rescission case, a federal  
 21 court in this state held: "the Court of Appeals conclusory findings  
 22 that there was 'some evidence' to support the rescinding, the BPH's  
 23 decision that parole was improvidently granted to petitioner, are  
 24 contrary to clearly established federal law and, to the extent they  
 25 are fact-based, represent unreasonable determinations of the facts  
 26 in light of the evidence presented in the state court proceedings."  
 27 Stockton v. Hepburn (N.D. Cal. 2005) 2005 U.S. Dist. LEXIS 4877 at  
 28 43; see also Irons v. Warden (N.D. Cal. 2004) 358 F.Supp.2d 936,

1 948 ("Clearly, a conclusion by lay BP[H] commissioners that  
 2 petitioner has not yet achieved required therapy for insight OR  
 3 OTHER REASONS is not reasonably sustainable, and a state court's  
 4 conclusion to the contrary is patently unreasonable.")

5 The federal liberty interest is made an adjunct to the state  
 6 requirements of due process by and through the 14th Amendment to  
 7 the U.S. Constitution and the substantial evidence of the federal  
 8 standard must be overcome to meet federal guarantees to its citizens  
 9 who, before they became entitled to state civil rights, were first  
 10 bestowed by operation of their federal citizenship. A state cannot  
 11 lawfully deny any federal right to its citizens but that is exactly  
 12 what respondents are demanding of their agents in the BPH, and will  
 13 no doubt now ask this Honorable Court to signoff on. That must not  
 14 be allowed if the judiciary is to be truly separated from the  
 15 Executive charades disguised as a legitimate exercise in freedom.

16 The goal of indeterminate sentences and the parole system is  
 17 not only to punish, but also to provide for reformation and  
 18 rehabilitation as the CDC's renaming suggests:

19 "The belief no longer prevails that every offense in  
 20 a like legal category calls for an identical punish-  
 21 ment without regard to past life and habits of a parti-  
 22 cular offender. ... Retribution is no longer the domi-  
 23 nant objective of the criminal law. Reformation and  
 24 rehabilitation of offenders have become important goals  
 of criminal jurisprudence."

23 People v. Morse (1964) 60 Cal.2d 631, 643 n.8 (quoting Williams  
 24 v. State of New York (1949) 337 U.S. 241, 247). In a lengthy discus-  
 25 sion of this topic, the Supreme Court stated the following:

26 "[T]he purpose of the indeterminate sentence law, like  
 27 other modern laws in relation to the administration  
 28 of criminal law, is to mitigate the punishment which  
 would otherwise be imposed upon the offender. These  
 laws place emphasis upon the reformation of the offender.

1 They seek to make the punishment fit the criminal rather  
 2 than the crime. They endeavor to put before the prisoner  
 3 great incentive to well-doing in order that his will  
 4 to do well should be strengthened and confirmed by the  
 5 habit of well-doing. [...] [The] interests of society  
 6 require that under prison discipline every effort should  
 7 be made to produce a reformation of the prisoner. ...  
 8 The legislative policy [was to provide a system whereby]  
 9 a hope was to be held out to prisoners that through  
 10 good conduct in prison and a disposition shown toward  
 11 reformation, they might be permitted a conditional liber-  
 12 ty upon restraint under which they might be restored  
 13 again to society. ... Although good conduct while in-  
 14 carceratd and potential for reform are not the only  
 15 relevant factors, this court has acknowledged their  
 16 significance. Furthermore, the Authority has declared  
 17 that these factors are among those of 'paramount impor-  
 18 tance.' In re Minnis, 7 Cal.3d 644-45.

11 The Rosenkrantz Court, at 656, citing to Minnis, reaffirmed  
 12 these principles: "[E]ven before factors relevant to parole de-  
 13 cisions had been set forth expressly by statute and regulations,  
 14 we concluded that '[a]ny official or board vested with discretion  
 15 is under an obligation to consider all relevant factors [], and  
 16 the [BPH] can't, consistently with its obligation, ignore post-  
 17 conviction factors UNLESS DIRECTED TO by the Legislature." (citing  
 18 Minnis at 645; emphasis added for illumination).

19 Petitioner has a Constitutional liberty interest in parole  
 20 decisions and "[P]arole applicants in this state have an expectation  
 21 that they will be granted parole unless the BPH finds, in its  
 22 reviewable discretion, that they are unsuitable for parole in light  
 23 of the circumstances specified by statute and regulation."  
 24 Rosenkrantz at 654 and at 659-61 this liberty interest is an  
 25 expectation protected by due process of law. (holding that the  
 26 California Constitution Art. V, §8(b) and PC §3041 "give rise to  
 27 a protected liberty interest" in that "a prisoner granted parole  
 28 by the BPH has an expectation that the Governor's decision to affirm

1 modify, or reverse the BPH's decision will be based upon the same  
2 factors the BPH is required to consider," and that "this liberty  
3 interest underlying a Governor's parole review decision is protected  
4 by due process of law.").

5 Federal courts have also unequivocally held that California's  
6 parole system gives rise to a liberty interest constitutionally  
7 protected by due process. See: Allen, infra at 376-78; Greenholtz  
8 v. Inmate of Neb. Penal & Corr. Complex (1979) 442 U.S. 1, 11-12  
9 (holding a state's statutory parole scheme that uses mandatory  
10 language may create a presumption that parole release will be  
11 granted upon certain circumstances or findings, thus giving rise  
12 to a constitutionally protected liberty interest); McQuillen, supra  
13 at 902-3 n.1 (holding that because parole scheme uses mandatory  
14 language and is largely parallel to the schemes found in Allen  
15 and Greenholtz do give rise to a protected liberty interest in RELEASE  
16 ON PAROLE, "California's parole scheme gives rise to a cognizable  
17 liberty interest in release on parole.") Biggs v. Terhune (9th  
18 Cir. 2003) 334 F.3d 910, 914-15 (same) and, ("[t]he liberty interest  
19 is created, not upon the grant of a parole date, but upon the  
20 incarceration of the inmate."

21 Rosenkrantz specifically rejected any position that a court  
22 may not properly examine the factual basis of parole decisions  
23 at 667, "[W]e conclude that the courts properly can review a  
24 Governor's decisions whether to affirm, modify, or reverse a parole  
25 decision by the BPH to determine whether they comply with due  
26 process of law, and that such review properly can include a determi-  
27 nation of whether the factual basis of such a decision is supported  
28 by some evidence in the record that was before the BPH.

1 Post-Rosenkrantz, courts have reaffirmed the concepts of broad  
2 executive deference but vigilant judicial review, by engaging care-  
3 ful analysis, will ensure that the boundaries of due process are  
4 respected and upheld. "[t]he exceedingly deferential nature of  
5 the "some evidence" standard of judicial review set forth in  
6 Rosenkrantz does not convert a court reviewing the denial of parole  
7 into a potted plant." In re Scott (119 Cal.App.4th 871, 898, re-  
8 cently affirmed).

9 The Court, in In re Dannenberg (2005) 34 Cal.4th 1061 at 1095  
10 n.16 reaffirmed that effective judicial review is critical to due  
11 process. Rejecting the dissent's suggestion that the opinion "per-  
12 mits untethered pro forma parole denials that are insulated from  
13 effective judicial review, thus contravening California life in-  
14 mates' due process rights to individualized parole consideration,"  
15 the majority made clear that the [BPH] must apply detailed standards  
16 in evaluating individual inmates' suitability for parole on public  
17 safety grounds, and that the Executive's broad discretion is subject  
18 to meaningful judicial oversight.

19 There is no question that the discretion afforded to the BPH  
20 with respect to parole decisions is great. However, the parole  
21 system's very purpose is to provide for the reentry into society  
22 of inmates who no longer pose a danger or unreasonable threat to  
23 public safety, and those rights afforded thereunder are  
24 constitutionally protected.

25 The BPH must abide by due process considerations, and the  
26 courts are entrusted with ensuring that such considerations are  
27 adequately respected and thus protected. Neither Rosenkrantz or  
28 Dannenberg permits respondents to immunize themselves from re-

1 view by unreasonable and possibly unlawful assertion that certain  
2 facts support a denial of parole. On the contrary, Rosenkrantz  
3 and Dannenberg make clear that the courts have a vital and therefore  
4 important role to play in ensuring that parole decisions are  
5 actually supported by "some evidence" having a basis in fact, and  
6 an indicia of reliability supported in the record.

7 Petitioner submits that there is a real danger that, improperly  
8 understood, the guidelines articulated in Rosenkrantz, Dannenberg,  
9 and the court of appeals will serve to provide respondents with  
10 de facto immunity from judicial review, a result anathema to state  
11 and federal due process protections. Properly understood, the "some  
12 evidence" standard provides a fair and proper framework for review  
13 of parole decisions in any venue, one that provides respondents  
14 with an appropriate level of deference in making extremely difficult  
15 decisions relating to inmates' liberty interests and public safety  
16 concerns, while ensuring that statutory and constitutional liberty  
17 interests are being adequately and lawfully safeguarded through  
18 judicial review. And, when this standard is properly applied to  
19 this case, there should be no doubt but that the BPH's denial of  
20 suitability seems unsustainable and must be reversed, a new hearing  
21 granted, and an Order with instructions issued.

22 WHEREFORE, Petitioner prays that the writ be granted in full  
23 and all available relief be accorded to Petitioner to comply with  
24 and comport to the state and federal Constitutions and the legal  
25 adversarial process and resolution of a judicious nature in this  
26 most important matter herein. Petitioner hereby incorporates by  
27 reference, as though fully set forth, all papers, pleadings,  
28 transcripts, exhibits and matters of record in the instant matter.

7. Ground 2 or Ground 3 (if applicable):

PETITIONER HAS A FEDERALLY-COGNIZABLE LIBERTY INTEREST IN RELEASE TO PAROLE CREATED BY RESPONDENT'S STATUTORY SCHEME AND MANDATORY LANGUAGE OF THE ENABLING STATUTES THAT REQUIRES A SUITABILITY FINDING UNDER STATUTORY CRITERIA AND RESPONDENTS' BURDEN IS NOT MET HEREIN

a. Supporting facts:

This petition is intended to give legitimate meaning to petitioner's seven (7) years-to-Life sentence by seeking an Order in this Court granting the writ to discharge petitioner from state prison, or alternatively, compelling the BPH to conduct a new parole consideration hearing and correctly weight their statutory findings to view suitability and consequent release to parole for Petitioner.

The issues raised are of constitutional dimension, comporting to petitioner's federal constitutional rights, and questioning the legality of petitioner's continued confinement in the face of overwhelming evidence of legally-sustainable proof of suitability and unquestioned state-hired professionals and their proffered opinions of reasonable assurance in adhering to concerns of public safety.

There is NO evidence having indicia of reliability that this petitioner poses an unreasonable risk of danger to the public and P.C. §3041(a) and California Code of Regulations (CCR), Title 15, Division II §§2402(d)(1,2,3,4,6,7,8 & 9) (parole suitability criteria) all make it clear that there IS A MANDATE, based on a legally-sufficient standard, and that standard is subject to judicial review  
(continued on attached pages)

b. Supporting cases, rules, or other authority:

(SEE ATTACHED POINTS AND AUTHORITIES)

1 (continued from previous page):

2 for abuse of discretion under a federal due process and equal protection umbrella with safeguards required in a  
3 review of the "evidence" of unsuitability that is burdened upon respondents.

4 The California Supreme Court recognizes that prisoners have procedural due process protections in  
5 connection with parole determinations. A legitimate expectancy of release to parole is created by PC § 3041. If  
6 the statute creates the legitimate expectancy of parole, it is not legally sufficient to answer that the BPH may, in  
7 its broad discretion, deny parole suitability.

8 This argument, that the BPH's broad discretion swallowed Petitioners liberty interest and expectation of  
9 release was squarely rejected by the High court in Allen, supra. Additionally, the Court stated in Rosenkrantz IV:  
10 "[P]arole applicants in this state *Have an expectation that they will be granted parole* unless the BP[H] finds in its  
11 discretion, that they are unsuitable for parole **in light of the circumstances specified by statute and**  
12 **regulation.**" Rosenkrantz V, supra, 29 Cal.4<sup>th</sup> at 654. And, [O]ur past decisions make clear that the **requirement**  
13 of procedural due process embodied in [Art. I, § 7, subd. (a)], places some limitations upon the broad  
14 discretionary authority of the BP[H]." Id. at 655.

15 Therefore, it is inherently clear that the presence of discretion held by the BPH does not, under either  
16 state or federal law, diminish nor extinguish the expectancy of release to parole nor in any ways Petitioner's due  
17 process rights. It thus follows that a liberty interest has existed under PC § 3041 that is embodied in, and  
18 protected by, the Fourteenth Amendment's Due Process Clause.

19 Also, CCR regulations use the "shall/unless" language (§§ 2401-2402) and recognize all available rights  
20 to Petitioners. Further, these regulations AS ORIGINALLY WRITTEN, made it even clearer that parole was to  
21 normally to be granted. This remained so until political operatives, presumably with a criminal bent, manipulated  
22 the executive and legislative branches to repeal this proviso and substitute a "Willie Horton" revision that was  
23 never fully explained to the public nor openly voted upon for acceptance and would've probably failed it there  
24 had been an honest attempt to do so.

25 For respondents to abrogate this federal liberty interest they must provide *substantial* relevant, reliable  
26 evidence having some indicia of credibility that Petitioner poses a CURRENT **unreasonable** threat to the public  
27 safety, as noted in In re Lee (10-10-06) Second District Court of Appeals, Division Eight; 49 Cal.Rptr.3<sup>rd</sup> 931,

28 A

In re: Peter Hernandez, on habeas corpus

1 where the court cautioned:

2 ["The commitment offense can negate suitability [for parole] only if circumstances of the crime ...  
 3 rationally indicate that the offender will present an unreasonable public safety risk if released from  
 4 prison."] In re Scott (2005) 133 Cal.App.4<sup>th</sup> 573, 595, [however], In re Lowe (2005) 130 Cal.App.4<sup>th</sup>  
 5 1405, suggested "some evidence" applies to the factors, not dangerousness.) Some evidence of  
 6 the existence of a particular factor does not necessarily equate to some evidence the [inmate's]  
 7 release unreasonably endangers public safety." Lee, supra, 936.

8 ¶The board and governor must focus their parole decisions on whether a prisoner  
 9 continues to pose an unreasonable risk to public safety. Such a practical inquiry, rooted in real  
 10 world crime and law and order, has no obvious intersection with incorporeal realm of legal  
 11 constructs." Id. at 940.

12 This is something they have patently failed to do, as testified to by virtually all of their own witnesses as  
 13 noted in attached Exhibit "C", which has been previously generated BY RESPONDENTS and provided to all  
 14 concerned parties prior to Petitioner's various hearings and with NO OBJECTIONS from respondents as being  
 15 accurate and meaningful to ascertain PRESENT DANGEROUSNESS.

16 "Unreasonable risk" evidence that meets the federal level of reliability must be drawn from an  
 17 individualized analysis of fifteen (15) factors identified by regulations: CCR § 2402(b); Rosenkrantz V at 653-54.  
 18 "Such information shall include circumstances of the prisoner's social history; past and present mental state; past  
 19 criminal history; [] the base and other commitment offenses; past and present attitude toward (sic) the crime; any  
 20 conditions of treatment or control ...; and any other information that bears on the prisoner's suitability for  
 21 release." (emphasis added.)

22 This extensive list of factors, including other relevant reliable information that must be considered, makes  
 23 it clear that the Legislature did not intend for any single factor to initially or consistently trump all the others. This  
 24 is exactly what is happening here however. Decision upon decisions by the BPH suggests that their focus is  
 25 exclusively on the commitment offense, a sub-factor among the total. The BPH insistently attempts to insulate  
 26 their failure to individually consider circumstances of suitability using makeweight exceptions to state by rote that,  
 27 'although post-conviction behavior was DULY CONSIDERED, and the inmate is otherwise suitable for release to  
 28 parole, the offense was so heinous, atrocious, or cruel, that Petitioner is ineligible for a finding of suitability. "The  
 evidence under-lying the BPH's decision must have some indicia of reliability." Jancsek v. Oregon Board of

Parole (9<sup>th</sup> Cir. 1987) 833 F.2d 1389, 1390.

The reduction of the parole assessment process to an occluded, myopic pseudo-consideration of the

B

In re: Peter Hernandez, on habeas corpus

one factor, and it alone—unerringly as an unwritten but accepted general rule practiced in all circumstances—was never intended by the Legislature and cannot be permitted nor allowed to continue and still comport with Rosenkrantz, Biggs, Martin, Morrall, Irons, Coleman, et cetera. See also: Environmental Defense Center, Inc. v. E.P.A. (2003) 344 f.3d 832, 858, fn. 36, (holding that a federal agency has acted in an arbitrary and capricious fashion, if “the agency has relied on factors that Congress has not intended to consider, entirely failed to consider an important aspect of the problem, and offered no explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a different view or the product of agency expertise.”); Arizona Cattlegrower’s Ass’n v. U.S. Fish & Wildlife, B.L.M. (9<sup>th</sup> Cir. 2001) 273 F.3d 1229, 1236 (holding judicial review under the “arbitrary and capricious” standard is “meaningless ... unless we carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors ...[.] while reviewing courts should uphold reasonable and defensible constructions of an agency’s enabling act, they must not rubber-stamp ... administrative decisions that they deem in-consistent with a or that frustrate the congressional policy underlying a statute.”)

First degree murder is not a crime that automatically allows one to be deemed unsuitable for release and parole. And, given the above directive in Environmental Defense Center, Inc. v. E.P.A and Arizona Cattlegrower’s Ass’n v. U.S. Fish & Wildlife, B.L.M., coupled with Rosenkrantz, Biggs, Martin, Morrall, Irons, Coleman, et al., there must be a base set of factors upon which a first degree murderer would have to be paroled or the BPH would risk violating due process. To determine what would qualify as more than the minimum necessary for a conviction, the courts must first consider what is required, at the minimum, for a conviction of first-degree murder.

Now that the crime is defined, the question must be what evidence indicates that any particular first degree murder was somehow “beyond the minimum necessary to sustain a conviction.” In sum: what evidence indicates the commitment offense was “*especially* heinous” or “*exceptionally* grave”, given that there typically must be a finding of some level of heinousness, callousness, and/or gravity of violence in order for a defendant to have had his first degree murder conviction sustained by the appellate courts in the first place?

Two previous panels found Petitioner suitable long ago and the only changes to these original grants has been a continued progress towards maturity, self-awareness, anger management and the kind of programming

C

In re: Peter Hernandez, on habeas corpus

1 which will assure Petitioner's continued positive behavior and determination and almost certain success as a  
2 parolee and valuable contributing member of the community.

3 The weapon enhancement does not reasonably demonstrate that this crime was "beyond the minimal  
4 elements" of a first-degree murder conviction, and is in no way some evidence establishing that he is currently an  
5 unreasonable threat to public safety. Indeed, if the BPH were to be able to rely on "weapon of choice" evidence  
6 in every case, **every** first degree murder would be "beyond the minimal elements" and there would be no way to  
7 commit a first degree murder in California that did not qualify as an "especially" heinous crime and thereby justify  
8 imprisonment for life, without any chance of parole. This is not what the Legislature wrote the enhancement  
9 statutes for nor the intended outcome of any additional punishment attached thereto, and exceeds the bounds of  
10 common sense in every conceivable manner.

11 This rendition illustrates further, the importance (given the short tenure of the suggestion that "some  
12 evidence" may be found in facts 'beyond the minimum necessary elements' of the commitment offense) of all  
13 courts providing enhanced guidance regarding what set of facts are sufficient to support a denial of parole  
14 suitability. Invariably, any such guidance should summarily relate to the relevance of the evidence; whether or  
15 not it is substantial for federal due process purposes; its relevance and its reliability; and the reasonableness one  
16 should exact in being able to conclude that the evidence sub-stantiates that the inmate is a CURRENT,  
17 UNREASONABLE THREAT to the safety and security of the public and the ability to lawfully abide within the  
18 community.

19 Sole reliance on the commitment offense to deny parole not only augurs the serious risk of being  
20 arbitrary AND capricious but is almost always counter-instructive. In the parole determination process, the panel  
21 is tasked with assuring the Executive branch the parole-worthy inmate was duly considered by determining if the  
22 prisoner is a CURRENT threat to the public safety. This determination is, in total, the only decision that the BPH  
23 is sanctioned to make by the Penal Code and Regulations codified for that purpose. All interpretations of  
24 mitigating and aggravating factors, and the weight given to the special circumstances of the offense, merely go  
25 to instruct this final conclusion. "A determination of unsuitability is simply shorthand for a finding that a prisoner

26 CURRENTLY would pose an unreasonable risk of danger if released at this time." Smith, supra, at p. 370, (citing  
27 C.C.R. § 2402(d), emphasis added.)

28 D  
In re: Peter Hernandez, on habeas corpus

1 WHEREFORE, Petitioner respectfully submits these issues, arguments and Exhibits and prays this  
2 Honorable Court and all Honorable Justices will grant the writ and Order Petitioner's release forth-with. Or, in the  
3 alternative, Order a Rehearing within thirty (30) days of the Order with instructions to individualize his complete  
4 suitability consideration without bias or political, personal, or tenorial consid-erations, and in accordance with the  
5 statutory mandate of P.C. § 3041(a), and any further relief as the Court may deem just and proper to protect  
6 Petitioner's civil rights.

7 ///

8 ///

9 ///

26  
27  
28 E  
In re: Peter Hernandez, on habeas corpus

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes. ☐ No. If yes, give the following information:
- a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):
- b. Result: N/A c. Date of decision: \_\_\_\_\_
- d. Case number or citation of opinion, if known: \_\_\_\_\_
- e. Issues raised: (1) \_\_\_\_\_
- (2) \_\_\_\_\_
- (3) \_\_\_\_\_
- f. Were you represented by counsel on appeal? ☐ Yes. ☐ No. If yes, state the attorney's name and address, if known: \_\_\_\_\_
9. Did you seek review in the California Supreme Court? ☐ Yes. ☐ No. If yes, give the following information:
- a. Result: N/A b. Date of decision: \_\_\_\_\_
- c. Case number or citation of opinion, if known: \_\_\_\_\_
- d. Issues raised: (1) \_\_\_\_\_
- (2) \_\_\_\_\_
- (3) \_\_\_\_\_
10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal: \_\_\_\_\_

THESE ISSUES ARE BEING TIMELY MADE FOR THE FIRST TIME ON THIS APPEAL

11. Administrative Review:

- a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

THERE IS NO ADMINISTRATIVE REMEDY AVAILABLE TO PURSUE

- b. Did you seek the highest level of administrative review available? ☐ Yes. ☐ No.  
 Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☐ Yes. If yes, continue with number 13. ☒ No. If no, skip to number 15.

13. a. (1) Name of court: \_\_\_\_\_

(2) Nature of proceeding (for example, "habeas corpus petition"): \_\_\_\_\_

(3) Issues raised: (a) \_\_\_\_\_

(b) \_\_\_\_\_

(4) Result (Attach order or explain why unavailable): \_\_\_\_\_

(5) Date of decision: \_\_\_\_\_

b. (1) Name of court: \_\_\_\_\_

(2) Nature of proceeding: \_\_\_\_\_

(3) Issues raised: (a) \_\_\_\_\_

(b) \_\_\_\_\_

(4) Result (Attach order or explain why unavailable): \_\_\_\_\_

(5) Date of decision: \_\_\_\_\_

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

\_\_\_\_\_

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

THERE HAS BEEN NO DELAY IN SEEKING THIS PETITION

16. Are you presently represented by counsel? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known:

\_\_\_\_\_

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☒ No. If yes, explain:

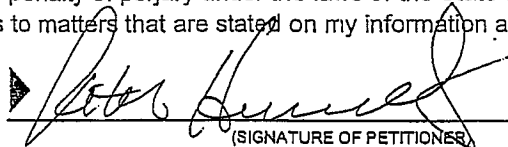
\_\_\_\_\_

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

VENUE IS PROPER AND THIS COURT HAS LEGAL JURISDICTION

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: Jan. 15, 2007

  
(SIGNATURE OF PETITIONER)

**EXHIBIT "A"**

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BOARD OF PRISON TERMS

STATE OF CALIFORNIA

LIFE PRISONER: PAROLE CONSIDERATION  
PROPOSED DECISION (BPT §2041)I. ☐ PAROLE DENIED

If this proposed decision denying parole is approved, the Board will send you a copy of the approved decision, including the reasons for denial of parole, within 30 days of the hearing.

II. ☒ PAROLE GRANTEDA. Base Period of Confinement ..... 180 Months

A 334928 1 Murder 1st  
Case No. Count No. Offense

B. Firearm Enhancement ..... + 24 Months

C. Other Crimes Total ..... + \_\_\_\_\_ Months

A 334928 2 36 mos.  
Case No. Count No. Offense

A 334928 3 12 mos.  
Case No. Count No. Offense

\_\_\_\_\_ mos.  
Case No. Count No. Offense

D. Total Term ..... = 252 MonthsE. Postconviction Credit From 3/24/79 To 8/3/88 - 30 Months  
(Date) (Date)F. Total Period of Confinement ..... = 222 Months

The period of confinement indicated is a tentative decision proposed by this panel. The decision will be reviewed pursuant to BPT §2041, and, if approved, a copy of the approved decision will be sent to you within 30 days. At that time appropriate pre-prison credits will be applied and a parole release date computed.

You will not engage in any conduct specified in BPT §2451. Such conduct may result in rescission or postponement of your parole date.

III. If the proposed decision denying or granting parole is disapproved, you will receive a copy of the proposed decision and the reasons for disapproval. You will then receive a copy of the modified decision or will be scheduled for a new hearing, as appropriate.

## PANEL HEARING CASE

Name	<u>Albert M. Liddy</u>	Date	<u>8/3/88</u>
Name	<u>Mawick Brown</u>	Date	<u>8/3/88</u>
Name	<u>Calvin Brown</u>	Date	<u>8/3/88</u>

NAME	CDC NUMBER	INSTITUTION	HEARING DATE
HERNANDEZ, PETER	C-03015	CMC-E	8-3-88

CALIFORNIA BOARD OF PRISON TERMS

In the Matter of the	Life Prisoner
Hearing of	Subsequent Parole Consideration (3)
HERNANDEZ, Peter	Granted
C-03015	
CMC-E	

This matter was heard before the Board of Prison Terms (BPT) on August 3, 1988, at the California Mens Colony - East. The hearing panel was composed of A. Leddy, Commissioner; M. O'Connell, Commissioner; and C. Brown, Deputy Commissioner.

Present at the hearing were: P. Hernandez, Prisoner; L. Clark, Counsel for Prisoner; and T. Craig, Deputy District Attorney, Los Angeles County.

Any others present are identified in the transcript.

Oral and documentary evidence was submitted and after due consideration of all the evidence, the panel makes the following findings:

Legal Status

On March 23, 1979, the prisoner was received in prison pursuant to Penal Code (PC) §1168 for a violation of PC §§187/12022/12022.5, and 217/12022.5, first degree murder while armed and with use of a firearm, and assault with intent to commit murder with use of a firearm, two counts, 1 - 14 years with the additional penalty offense of 5 - life, consecutive and concurrent with Count 1 (Los Angeles County Case No. A-334928, Counts 1, 2, and 3). The controlling minimum eligible parole date (MEPD) is September 3, 1985.

PC §3041(a) provides that the BPT shall meet with persons sentenced under PC §1168 and shall normally set a parole release date unless, pursuant to PC §3041(b), the Board determines that a parole date cannot be fixed at this hearing.

This hearing is conducted pursuant to the California Administrative Code (CAC), Division 2, Chapter 3, Article 5, which sets forth parole consideration criteria and guidelines for life prisoners implementing PC §3041.

Statement of Facts

The prisoner was convicted of first degree murder in the shooting death of victim Tony Sanchez. The prisoner went through three trials and was committed to California Department of Corrections (CDC) nearly two years after the murder. The prisoner was arrested as a result of an investigation into a triple shooting which occurred April 25, 1977, at about 9:10 p.m., near 1185 W. 24th Street in Los Angeles. Three victims, Tony Sanchez, Eladoro Rosales and Santo Rodriguez, were accosted by the prisoner and a crime partner while standing in front of the 24th Street address. After a few words between them, the prisoner drew a handgun and began firing. Victim Sanchez was immediately mortally wounded. Victim Rodriguez was shot in the left thigh, but turned and ran. Victim Rosales was subsequently

shot in the buttocks as he and Rodriquez fled on foot. Victim Rosales died shortly after the shooting, but his death was not connected to this incident or the prisoner.

Parole Suitability

CAC §2281(a) requires that the panel first determine whether the prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison. CAC §2281(c) sets forth circumstances tending to show unsuitability and CAC §2281(d) sets forth circumstances tending to show suitability. These regulations are guidelines only.

The panel relied on the following circumstances in determining whether or not the prisoner is suitable for parole:

1. The prisoner has no juvenile record of assaulting others;
2. The prisoner has a stable social history as exhibited by his reasonably stable relationships with others;
3. While imprisoned, the prisoner enhanced his ability to function within the law upon release through

participation in educational programs; self-help and therapy programs, i.e., Alcoholics Anonymous (AA) and Narcotics Anonymous (NA); vocational programs, and institutional job assignments;

4. Motivation for crime. The crime was committed as a result of significant stress in the prisoner's life;

5. The prisoner lacks a significant criminal history of violent crime;

6. The prisoner's maturation reduces the probability of recidivism;

7. The prisoner has realistic parole plans which include family support;

8. The prisoner has maintained close family ties while imprisoned via letters and some visits;

9. The prisoner's positive institutional behavior which indicates significant improvement in self-control

10. The prisoner shows signs of remorse and gives indications that he understands the nature and magnitude of the offense. He accepts responsibility for his criminal behavior and he has the desire to change toward good citizenship;

11. The Category X Diagnostic Unit Evaluation dated June 28, 1988, is favorable.

Based on the information contained in the record and considered at this hearing, the panel states as required by PC §3043 that the prisoner would not pose a threat to public safety if released on parole.

Therefore, the prisoner is found suitable for a projected release date.

Base Term of Confinement

PC §3041(a) provides that if a prisoner is found suitable for parole, the Board shall set a parole release date in a manner "...that will provide uniform terms for offenses of a similar gravity and magnitude in respect to their threat to the public." CAC §§2282-2292 implement this policy. CAC §2282 requires that a term be set for the base offense, the most serious of all life offenses for which the prisoner has been committed to prison. Suggested base terms are set forth in CAC §§2282(b) and 2403(c). CAC §§2283 and 2284 set forth circumstances in aggravation and mitigation respectively. All of these regulations are guidelines only.

The term is derived from the matrix at BPT Rules (2282-B) (2282-C); Categories III-C, in that there was no prior relationship with the victim and death was immediate.

The panel assessed 180 months for the base offense and noted that this is the middle term.

Firearm Enhancement

CAC §2285 provides for an additional term of 2 years if the prisoner personally used a firearm in the commission of any life crime unless the panel states specific reasons for not adding enhancement.

The term set forth above is increased by 2 years for the use of a firearm in the offense.

Non-Life Commitment - Principal Term (BPT§2286(b)(1):

<u>Offense</u>	<u>PC§</u>	<u>Case #</u>	<u>Ct. #</u>	<u>Time</u> <u>Assessed</u>
Assault with intent to murder	217	A334928	2	<u>36</u>
TOTAL				36

The panel did not enhance for firearm; already did so for the same gun on the murder, and felt the term was sufficient.

Non-Life Commitments; Subordinate Terms:

<u>Offenses</u>	<u>PC §</u>	<u>Case #</u>	<u>Count</u>	<u>Time</u> <u>Assessed</u>
Assault with intent to murder	217		3	<u>12</u>
TOTAL				12

The panel did not enhance for the prior grand theft auto because the prisoner was drunk and he received probation and a \$35 fine.

Post-Conviction Behavior

CAC §2290 establishes procedures for the application of credit for good behavior in prison which may be used to reduce the term or advance a parole date already established.

Statements submitted into prisoner's record pursuant to PC §§1203.01 and 3042 have been considered by the Board panel in this hearing.

March 23, 1979 to March 1980:

MONTHS

RCC-CIM-SQ, vocational electrical maintenance 5/79 - 12/79, to school full time, group therapy, and disciplinary free -

4

March 1980 to March 1981:

SQ-Med A, school full time, Catholic chapel worker, group therapy, and disciplinary free-

4

March 1981 to March 1982:

7/20/87, received a California Department of Corrections (CDC) disciplinary (115) for marijuana

possession, 6/12/87, graduated from  
high school, Mens Advisory Council  
(MAN) vice president, janitor, self-  
help-Navy video-with laudatories -

0

March 1982 to March 1983:

MCF, captains clerk with  
laudatories, assigned dental clinic,  
MAC vice president, college courses -

4

March 1983 to March 1984:

CTF, Medium A, received a CDC  
115 for force and violence, maintenance  
work crew, vocational TV prod. -

0

March 1984 to March 1985:

CTF, Vocational TV prod, one year  
completed, community awareness group,  
self-help, and disciplinary free -

4

March 1985 to March 1986:

CTF-CMC 12/85, vocational TV prod.  
transferred to procurement clerk, and  
disciplinary free -

4

March 1986 to March 1987:

CMC, vocational electronics,  
data processing, participation in AA  
and substance abuse group, and

disciplinary free -

4

March 1987 to March 1988:

CMC, vocational electrinoes,

data processing, participation in AA

and substance abuse group, and

disciplinary free -

4

March 1988 to August 3, 1988:

CMC-Category he participated in

the Category X program, AA, and

vocational data processing -

2

TOTAL

30

Order

PC §3041.5(b)(1) provides that within ten days following any meeting where a parole date has been set, the Board shall send the prisoner a written statement setting forth his parole date, the conditions he must meet in order to be released on the date set, and the consequences of failure to meet such conditions.

The total period of confinement pursuant to this decision is composed of: 252 months Base Term and enhancements; less 30 months post-conviction credits for a total of 222 months.

The prisoner shall not engage in the conduct specified in CAC §2451. Such conduct may result in rescission or

RECORDS OFFICER  
USEPre-prison  
Credit

postponement of the parole date.

Parole Conditions

PC §3053 provides that the BPT, upon granting any parole to any prisoner, may impose on the parole such conditions as it may deem proper.

The prisoner is to be released pursuant to the notice and general conditions of parole established in CAC §§2511 & 2512.

In addition, the prisoner is subject to the following Special Conditions of Parole pursuant to CAC §2513:

1. Do not use alcoholic beverages;
2. Participate in anti-narcotic testing.

EFFECTIVE DATE OF THIS DECISION \_\_\_\_\_.

HERNANDEZ, P. C-03015

-10-

8/3/88

ld

## MISCELLANEOUS DECISIONS

## FACTS

8-3-88 - Life parole consideration hearing conducted at California Mens Colony-East. Parole date granted.

9/19/88 - Decision Review Committee met and vacated decision of 8/3/88 and ordered new hearing.

## RECOMMENDATION(S)

Schedule for new hearing as soon as possible on next available calendar.

STAFF (Name)	TITLE	DATE
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## DECISION(S)

1.

2.

3.

## PANEL HEARING CASE

## DECISION DATE

NAME

*Robert L. Patterson**10/21/88*

NAME

NAME

NAME

NUMBER

INSTITUTION OR REGION (UNIT)

HERNANDEZ, P.

*B*-03015

CMC-EAST

REVIEW OF PROPOSED DECISION

☐ APPROVED ☒ REFER TO DECISION REVIEW COMMITTEE ☐ REFER TO RECONSIDERATION PANEL

INMATE Hernandez, Peter	CDC NUMBER C-03015
TYPE OF HEARING Life	DATE OF HEARING August 3, 1988

The Decision Review Unit has completed a review of the above hearing and has identified the following issues which need further review: (Attach page 2 if necessary.)

1. The panel, when dictating the "legal status," set forth that the murder first conviction (Count 1) was while armed (12022 PC) and that he used a firearm in the commission of the offense (12022.5 PC).

Recommendation: That the "12022/12022.5" be stricken.

a) We believe, however, that notwithstanding the action of the court, the Board may, pursuant to CCR §2285, upon finding that the inmate personally used a firearm in the (a) life crime, the panel may properly assess an additional 24 month enhancement.

2. We also note that the panel chose the base matrix of "III-C" stating, "...that there was no prior relationship with the victim and the death was immediate. While it is true that there was no prior relationship (known), if death was immediate (then the BPT matrix) III B appears to be the appropriate matrix to use. III C relates to "severe trauma."

3. Number 5 for justification, "...prisoner lacks a significant criminal history of violent crime," while this appears to be correct, we discovered during our review that the inmate's juvenile record was destroyed (page 7 Institutional Programming Summary). Accordingly, and

RECOMMENDATION

See BPT 1139 Modification Ordered.

DECISION REVIEW UNIT SIGNATURE WILLIAM V. CASHDOLLAR	DATE August 26, 1988	
REVIEWED BY LEGAL COUNSEL <input type="checkbox"/> YES <input type="checkbox"/> NO	LEGAL COUNSEL INITIALS	RESULT <input type="checkbox"/> CONCUR <input type="checkbox"/> DISSENT
LEGAL COUNSEL COMMENTS.		

I have reviewed the above-referenced file and ☒ concur ☐ dissent with the Decision Review Unit.  
COMMENTS.

*Refer to Decision Review Committee*

CHIEF DEPUTY COMMISSIONER SIGNATURE <i>James B. ...</i>	DATE 9/6/88
--	----------------

BPT 1139 (4/87)  
BOARD OF PRISON TERMS

BOARD OF PRISON TERMS

STATE OF CALIFORNIA

## DECISION REVIEW COMMITTEE REVIEW OF PROPOSED DECISION

INMATE Hernandez, Peter	CDC NUMBER C-03015
TYPE OF HEARING Life	DATE OF HEARING August 3, 1988
<input type="checkbox"/> Affirm original decision <input checked="" type="checkbox"/> Schedule new hearing <input type="checkbox"/> Modify decision	

MODIFICATION ORDERED: (Panel - Please Mark Appropriate Box Above)

1. Strike the "12022/12022.5 PC" from Count 1, page one of the proposed decision, under the category "Legal Status."
2. Since the matrix of III C is "14-16-18" and III B is "13-15-17," we order that this entire matter be reheard so that all circumstances may be given proper weight. We recommend that the rehearing panel, absent establishing cause not to, that it seriously consider following the intent of the first panel with respect to the granting of the date.
3. We order that the rehearing panel determine the appropriateness of relying on the absence of a violent history since we are informed that the inmate's (24 years old at entry into prison) juvenile record had been destroyed and therefore is not available to rely on.
4. We order a new hearing.

## SUPPORTIVE REASONING FOR DECISION:

1. To comply with the court's finding.
2. To provide the Board with adequate discretion to structure a sentence in keeping with the facts of this case.
3. To provide for correct results.
4. To allow the Board the ability to fully consider all aspects of this case.

<i>Rudolph Castro</i>	9-19-88	<input checked="" type="checkbox"/> CONCUR	
COMMISSIONER SIGNATURE	DATE	<input checked="" type="checkbox"/> CONCUR	<input type="checkbox"/> DISSENT
<i>Joseph B. Luna</i>	9-19-88	<input checked="" type="checkbox"/> CONCUR	<input type="checkbox"/> DISSENT
COMMISSIONER/D.C. SIGNATURE	DATE	<input checked="" type="checkbox"/> CONCUR	<input type="checkbox"/> DISSENT
<i>Michael J. ...</i>		<input type="checkbox"/> CONCUR	<input type="checkbox"/> DISSENT
COMMISSIONER/D.C. SIGNATURE	DATE	<input type="checkbox"/> CONCUR	<input type="checkbox"/> DISSENT

I dissent from the majority for the following reasons:

SIGNATURE

DATE

REVIEW OF PROPOSED DECISION

(Continued)

absent such a record, reliance on such a "fact" should be reviewed by the Decision Review Committee.

4. Calculation error - (Count 3 only; may wish to consider Count 2).

	<u>Crime</u>		<u>Panel Calculation</u>		<u>Recommended Calculation</u>
Count 1	187	Base	180		180
	12022	(BPT 2285)	24		24
	12022.5				
Count 2	217	Principal	36	Principal	36
	12022.5		0		(24) <sup>1</sup>
Count 3	217	Subordinate	12	Subordinate	12
	12022.5		0 <sup>2</sup>		8
			<u>252 months</u>		<u>264 months</u>
					(+12 months)

Note: if Panel calculation accepted, then only error relat to Count 3, regarding 12022.5.

1/ Panel did not enhance for firearm; already did so for the same gun on the murder, and felt the term was sufficient. This is entirely appropriate, and we only place the "24" within the Recommended Calculation category to (1) allow the Decision Review Committee the opportunity to review, but more importantly (2) to establish that it is entirely appropriate to assess a 24 month enhancement under PC 1170.1 as the enhancement relates to a "violent felony" (PC 667) and may be used for the life crime and the non-life crime.

2/ Panel failed to mention any reason to mitigate or to not impose.

## LIFE PRISONER DECISION F

## PERIOD OF CONFINEMENT

(RECORDS OFFICER USE ONLY)

	YR	MO	DA
Adjusted Period of Confinement .....	17	11	16
Reception Date (See BPT §2289) .....	+ 79	3	21
At Large Time .....	+ —		
PAROLE DATE .....	= 97	- 3	- 5

## MISCELLANEOUS

*Parole granted  
Keep at CMC until finishes reaction training.*

*Place on appropriate progress calendar PH 8/8*

## PENAL CODE NOTICES

SECTION 3042

☒ SENT

June 30, 1988

(DATE)

## COMMITMENT OFFENSE

187PC

Murder 1st

(CODE SECTION)

(TITLE)

A334928

Ct. 1

(CASE NUMBER)

(COUNT NUMBER)

Date Received by CDC

3-23-79

Controlling MEPD

9-3-85

Type of Hearing

☐ INITIAL☒ SUBSEQUENT

3

(HEARING NO.)

If Subsequent Hearing, Date of Last Hearing

8-6-87

Department Representative

Counsel for Prisoner

Linda Clark

Address

93561

102 South Robinson, PO Box 26, Tehachapi, CA

District Attorney Representative

County

L.A.

## PAROLE HEARING CALENDAR

The following represents the findings, determination, and order of the Board of Prison Terms, State of California.

By:

Presiding (Name)

*Alfred M. Ledy*

Date

*7/13*

Concurring (Name)

*Adrian O. Brown*

Date

*7/13*

Concurring (Name)

*Eled Brown*

Date

*8/8*

NAME	CDC NUMBER	INSTITUTION	CALENDAR	HEARING DATE
HERNANDEZ, PETER	C-03015	CMC-E	8/88	8-3-88

PERIOD OF CONFINEMENT  
(RECORDS OFFICER USE ONLY)

		YR	MO	DAY
Adjusted Period of Confinement .....	15-05-10	15-	11-	10
Reception Date (See BPT §2289) .....	79-03-23	+	79-	03-23
At Large Time .....	0	+	0	
PAROLE DATE .....	94-09-02	=	95-	03-03

MISCELLANEOUS

*Parole granted*

*PH 1/93*

PENAL CODE NOTICES

SECTION 3042



SENT

11-30-89

(DATE)

COMMITMENT OFFENSE

187 PC

(CODE SECTION)

MURDER 1ST

(TITLE)

A334928

(CASE NUMBER)

1

(COUNT NUMBER)

Date Received by CDC

3-23-79

Controlling MEPD

9-3-85

Type of Hearing



INITIAL



SUBSEQUENT

5

(HEARING NO.)

If Subsequent Hearing, Date of Last Hearing

1-25-89

Department Representative

Counsel for Prisoner

ME. LINDA CLARK

Address

P.O. BOX 26 TEHACHAPI, CA. 93561

District Attorney Representative

County

LOS ANGELES

PAROLE HEARING CALENDAR

The following represents the findings, determination, and order of the Board of Prison Terms, State of California.

By:

Presiding (Name)

*Emilio J. Lopez*

Date

Concurring (Name)

*P. Brown*

Date

*1/23/90*

Concurring (Name)

*Rafael J. Jaramila*

Date

NAME	CDC NUMBER	INSTITUTION	CALENDAR	HEARING DATE
HERNANDEZ, PETER	C-03015	CMC-E	1-90	1-23-90



PC §3041(a) provides that the BPT shall meet with persons sentenced under PC §1168 and shall normally set a parole release date unless, pursuant to PC §3041(b), the Board determines that a parole date cannot be fixed at this hearing.

This hearing is conducted pursuant to Title 15, California Code of Regulations (15 CCR), Division 2, Chapter 3, Article 5, which sets forth parole consideration criteria and guidelines for life prisoners implementing PC §3041.

Statement of Facts

The prisoner was convicted of first degree murder in the shooting death of victim Tony Sanchez. The prisoner went through three trials and was committed to the California Department of Corrections (CDC) nearly two years after the murder. The prisoner was arrested as a result of an investigation into a triple shooting which occurred April 25, 1977, at about 9:10 p.m., near 1185 West 24th Street in Los Angeles. Three victims, Tony Sanchez, Eledoro Rosales and Santo Rodriguez, were accosted by the prisoner and a crime partner while standing in front of the 24th Street address. After a few words between them, the prisoner drew a handgun and began firing. Victim Sanchez was immediately mortally wounded. Victim Rodriguez was

shot in the left eye, but turned and ran. Victim Rosales was subsequently shot in the buttocks as he and Rodriguez fled on foot. Victim Rosales died shortly after the shooting, but his death was not connected to this incident or the prisoner.

#### Parole Suitability

15 CCR §2281(a) requires that the panel first determine whether the prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison. 15 CCR §2281(c) sets forth circumstances tending to show unsuitability and 15 CCR §2281(d) sets forth circumstances tending to show suitability. These regulations are guidelines only.

The panel relied on the following circumstances in determining whether or not the prisoner is suitable for parole:

1. The prisoner has a stable social history as exhibited by his reasonably stable relationships with others including an honorable discharge from the United States Army.
2. While imprisoned, the prisoner enhanced his ability

to function within the law upon release through participation in:

- a) Educational programs which included a high school diploma on June 12, 1987;
- b) Self-help and therapy programs, notably Alcoholics Anonymous (AA) with attendance from 1986 and continuing to the present date;
- c) Vocational programs, i.e., Vocational Television Production, Vocational Electric Maintenance, Vocational Electronics and Data Processing, all completed;
- d) Institutional job assignments including Procurement Clerk and Hospital Purchasing Clerk with exceptional work reports.

3. The motivation for crime was committed as a result of significant stress in the prisoner's life at that time.

4. The prisoner lacks a significant history of violent crime. There was an arrest for robbery on January 8, 1977, which was reduced to Vehicle Code Section 10851 with a 36 month summary probation and fine.

5. The prisoner's maturation, growth and understanding and age upon release reduces the probability of recidivism.

6. The prisoner has realistic parole plans which include family support and employment offers.

7. The prisoner has maintained close family ties while

imprisoned via letters and some visits.

8. The prisoner's positive institutional behavior indicates significant improvement in self-control. In 1988, the prisoner was granted a parole date but was not approved upon review, yet he continued to maintain positive adjustments giving a good indication of his ability to function under stress.

9. The prisoner shows signs of remorse and gives indications that he understands the nature and magnitude of the offense. He accepts responsibility for his criminal behavior, and has the desire to change toward good citizenship.

10. The representative of the District Attorney's Office of Los Angeles who was at the hearing was not opposed to parole and this was considered by the Panel. The comments of the Decision Review Unit Report dated August 26, 1988 were also considered by the panel.

11. Psychiatric Factors. The Psychiatric Evaluation dated October 25, 1989, authored by Sherman E. Butler, M.D., Staff Psychiatrist, is favorable for parole release.

The Category X Psychiatric Council Evaluation dated June 28, 1988, authored by R. A. Orling, Ph.D., Senior Psychologist, Steven C. Walker, Ph.D., Staff Psychologist, and Ron Metz, Correctional Counselor II, is favorable and indicates that the prisoner's violence potential is less

than average and he is expected to remain psychiatrically stable upon release.

Based on the information contained in the record and considered at this hearing, the panel states as required by PC §3043.5 that the prisoner would not pose a threat to public safety if released on parole.

Therefore, the prisoner is found suitable for a projected release date.

Base Term of Confinement

PC §3041(a) provides that if a prisoner is found suitable for parole, the Board shall set a parole release date in a manner "...that will provide uniform terms for offenses of a similar gravity and magnitude in respect to their threat to the public." 15 CCR §2280-2290 implement this policy. 15 CCR §2282(a) requires that a term be set for the base offense, the most serious of all life offenses for which the prisoner has been committed to prison. Suggested base terms are set forth in 15 CCR §2282(b). 15 CCR §§2283 and 2284 set forth circumstances in aggravation and mitigation respectively. All of these regulations are guidelines only.

Based upon the facts set forth above, the base offense is first degree murder, PC §187, Case No. A-334928, Count one.

16-11-3

00-06-2

16-05-1

FOR RECORDS OFFICE USE Pre-prison Credit
--

The term is derived from the matrix at 15 CCR §2282(b), Category III-B, in that there was no prior relationship existed between the victim and the prisoner and death was immediate.

The panel assessed 204 months for the base offense and noted that this is the aggravated term due to the following reasons:

In committing the offense, the prisoner subjected two other persons to serious injury or death.

Firearm Enhancement

CAC §2285 provides for an additional term of 2 years if the prisoner personally used a firearm in the commission of any life crime unless the panel states specific reasons for not adding enhancement.

The term set forth above is increased by 2 years for the use of a firearm in the offense.

The panel is not assessing any time for the charges for assault with intent to commit murder with use of firearm violation of PC §217 and 12022.5 Case No. A-334928 Counts 2 and three.

The panel elected not to assess any time for non-life commitments because they occurred in the same transaction as the life crime and the panel further believes that the time assessed for the base offense is appropriate for the

16-05-1

+ 02-00-0

18-05-10

total incident.

Post-Conviction Behavior

15 CCR §2290 establishes procedures for the application of credit for good behavior in prison which may be used to reduce the term or advance a parole date already established.

March 1979 to March 1980:

MONTHS

The prisoner participated in Vocational Electrical Maintenance. He went to school full time, participated in group therapy programming and remained disciplinary free -

4

March 1980 to March 1981:

The prisoner went to school full time at SQ. He was a Catholic Chapel worker and participated in group therapy programming. He remained disciplinary free -

4

March 1981 to March 1982:

On 7/20/87, the prisoner received a California Department of Corrections (CDC) disciplinary (115) for marijuana possession. On 6/12/87, he graduated from high school. He was vice president of the Mens Advisory Council (MAN) and a janitor -

0

March 1982 to March 1983:

The prisoner was a Captains Clerk with  
laudatories. He was assigned to the dental  
clinic. He was the Mens Advisory Clinic  
(MAC) Vice President and took college courses - 4

March 1983 to March 1984:

The prisoner received a CDC 115 for force  
and violence. He was assigned to the  
maintenance crew and Vocational TV Prod. - 0

March 1984 to March 1985:

The prisoner completed one year in  
Vocational TV Prod. at CTF. He was involved  
in the community awareness group and participated  
in self-help. He remained disciplinary free - 4

March 1985 to March 1986:

The prisoner was assigned to Vocational  
TV Prod. at CTF/CMC. He was a Procurement Clerk.  
He remained disciplinary free - 4

March 1986 to March 1987:

The prisoner was at CMC and assigned to  
Vocational Electronics and Data Processing.  
He participated in AA and substance abuse  
groups. He remained disciplinary free - 4

March 1987 to March 1988:

The prisoner continued Vocational Electronics and Data Processing. He continued participation in AA and substance abuse groups. He remained disciplinary free - 4

March 1988 to March 1989:

The prisoner participated in the Category X Program at CMC. He continued participation in Vocational Data Processing and AA. He remained disciplinary free - 4

March 1989 to January 23, 1989:

The prisoner was a Procurement Clerk. He continued Vocational Data Processing and his participation in AA. He remained disciplinary free - 4

TOTAL

36

Statements submitted into the prisoner's record pursuant to PC §§1203.01 and 3042 have been considered by the Board panel in this hearing.

Order

PC §3041.5(b)(1) provides that within ten days following any meeting where a parole date has been set, the Board shall send the prisoner a written statement setting forth his parole date, the conditions he must meet in order to be released on the date set, and the consequences of

18-05-11

- 03-00-0

15-05-1

failure to meet such conditions.

The total period of confinement pursuant to this decision is composed of: 228 months Base Term and enhancements; less 36 months post-conviction credits for a total of 192 months.

The prisoner shall not engage in the conduct specified in 15 CCR §2451. Such conduct may result in rescission or postponement of the parole date.

Parole Conditions

PC §3053 provides that the BPT, upon granting any parole to any prisoner, may impose on the parole such conditions as it may deem proper.

The prisoner is to be released pursuant to the notice and general conditions of parole established in 15 CCR §§2511 & 2512.

In addition, the prisoner is subject to the following special conditions of parole pursuant to 15 CCR §2513:

1. Do not use alcoholic beverages.
2. Participate in anti-narcotic testing.

The reason for the imposition of Special Conditions is that Alcohol abuse was related to the instant offense.

NOTE TO CDC STAFF:

If the prisoner is released to a county other than the county of the commitment offense, the BPT is to be

FOR  
RECORDS OFFICE  
USEPre-prison  
Credit

notified.

EFFECTIVE DATE OF THIS DECISION FEB 22 1990

HERNANDEZ, P. C-03015

-12-

1/23/90

km

STATE OF CALIFORNIA 2135

## BOARD OF PRISON TERMS

## REVIEW OF PROPOSED DECISION

☐ APPROVED☒

REFER TO DECISION REVIEW COMMITTEE

☐

REFER TO RECONSIDERATION PANEL

INMATE Peter Hernandez

CDC NUMBER C 03015

TYPE OF HEARING Subsequent Parole Consideration Hearing

DATE OF HEARING 1/23/90

The Decision Review Unit (LMS) has completed a review of the above hearing and has identified the following issues which need further review.

The hearing panel in assessing the term gave the prisoner 6 months for a prior felony conviction under 15 CCR sec. 2286(c)(2). The conviction for which the time was assessed was a vehicle theft under VC sec. 10851 for which the prisoner was sentenced in 1977 to 36 months summary probation and received a fine. This offense was not a felony (see PC § 17(b)(1) and the CII rap sheet). Therefore, six months should not have been assessed for this offense.

## RECOMMENDATION:

Eliminate the paragraph (on page 7 of the yellow decision) assessing time for the prior felony conviction, change the total time assessed on page 11 of the blue decision to 228 months (instead of the panel's assessment of 234 months), and change the total decision time after deduction of credits to 192 months (from 198 months).

DECISION REVIEW UNIT SIGNATURE

WILLIAM V. CASHDOLLAR

DATE

2-5-90

REVIEWED BY LEGAL COUNSEL

LEGAL COUNSEL INITIALS

RESULT

☐ CONCUR☐ DISSENT☐ YES ☐ NO

LEGAL COUNSEL COMMENTS:

I have reviewed the above-referenced file and ☒ concur ☐ dissent with the Decision Review Unit.

COMMENTS:

*Refer To Decision Review Committee*

CHIEF DEPUTY COMMISSIONER SIGNATURE

DATE

2-7-90

BPT 1138 (4/87)  
STATE OF CALIFORNIA

Page 1 of 1

BOARD

BOARD OF PRISON TERMS

STATE OF CALIFORNIA

## DECISION REVIEW COMMITTEE REVIEW OF PROPOSED DECISION

INMATE Peter Hernandez

CDC Number C 03015

TYPE OF HEARING Subsequent LIFE PAROLE CONSIDERATION

DATE OF HEARING 1/23/90

☐ Affirm original decision☐ Schedule new hearing☒ Modify decision

## MODIFICATION ORDERED:

Eliminate the paragraph (on page 7 of the yellow decision) assessing time for the prior felony conviction, change the total time assessed on page II of the blue decision to 228 months (instead of the panel's assessment of 234 months), and change the total decision time after deduction of credits to 192 months (from 198 months).

## SUPPORTIVE REASONING FOR DECISION:

This more closely carries out the intention of the hearing panel.

COMMISSIONER SIGNATURE

DATE

☒ CONCUR☐ DISSENT

COMMISSIONER/D.C. SIGNATURE

DATE

☒ CONCUR☐ DISSENT

COMMISSIONER/D.C. SIGNATURE

DATE

☒ CONCUR☐ DISSENT

I dissent from the majority for the following reasons:

SIGNATURE

DATE

BPT 1139 (4/87)

60

1  
2 person's really should be taken away because of maybe's and  
3 innuendos. And I agree with Mr. Giss, I think letters from  
4 law enforcement agencies should be at least read between the  
5 lines, because, I mean, it's kind of a "them and us"  
6 attitude, you'll pardon me for saying this, Mr. Jauregui,  
7 but I think you know what I'm talking about, the "them and  
8 us" attitude, it seems to me, can go so far that it's  
9 overboard. And I don't, in my own mind, from having worked  
10 with and talked with Mr. Hernandez for several years, I  
11 don't believe this incident was gang related. I think it  
12 was what he says it was. He was counseled by his attorney  
13 or attorneys not to say what it was, not to discuss it, to  
14 the point that finally he came forward himself, after his  
15 appeal process was exhausted, and I believe he came in to a  
16 room like this and told the truth about it for the first  
17 time. I think he's telling the truth today. That's all I  
18 have to say.

19 PRESIDING DEPUTY COMMISSIONER COLDREN: Thank you,  
20 Miss Clark. Mr. Hernandez?

21 INMATE HERNANDEZ: Yes, sir. I have nothing.

22 PRESIDING DEPUTY COMMISSIONER COLDREN: Okay. The  
23 time is now eight minutes before 10:00 o'clock. We're going  
24 to go into recess, deliberate, and we'll go off record at  
25 this time.

26 RECESS

27 PRESIDING DEPUTY COMMISSIONER COLDREN: Okay. The  
28

61

time is 10:40, and all parties previously assembled here, including the prisoner, Mr. Hernandez. Mr. Hernandez has found you suitable for parole and relied upon the following circumstances in determining that you are suitable and would not pose a threat to public safety if paroled. Number one. Stable social history, as exhibited by reasonably stable relationships with others, including an honorable discharge from the U.S. Army. While in prison, prisoner enhances ability to function within the law upon release through participation in educational programs, including a high school diploma, on 06/12/87. Self-help and therapy programs, notably Alcoholics Anonymous, with attendance from 1986 continuing to the present date. Vocational programs; Vocational T.V. Production, Vocational Electrical Maintenance, Vocational Electronics, Data Processing, all completed. Institutional job assignments, including Procurement Clerk and Hospital Purchasing Clerk, all with exceptional work reports. Motivation for the crime committed as a result of significant stresses in the prisoner's life at that time. There is a lack of significant criminal history of violent crime. There was an arrest for robbery on 01/08/77, but this was reduced to a violation of 10851 of the Vehicle Code, with a 36 months summary probation assessed, as well as a fine. Prisoner's maturational, growth, understanding, and age upon release reduces the probability of recidivism. Realistic parole

plans include family support and employment offers. Prisoner has maintained close family ties while in prison via letters and some visits. There is a positive institutional behavior which indicates significant improvement in self-control. The panel notes that in 1988, the prisoner was granted a parole date, but this was not approved upon review. Yet, prisoner continued to maintain positive adjustments, giving a good indication of his ability to function under stress. Signs of remorse. The prisoner gives indications that he understands the nature and magnitude of the offense, and accepts responsibility for his criminal behavior. He has the desire to change toward good citizenship. Other reasons or information bearing upon suitability for release include the following. The District Attorney's Office of Los Angeles is not opposed to parole, and this was considered by the panel. The comments of the Decision Review Unit Report dated 08/26/88 were also considered by the panel. Under psychiatric factors. The psychiatric report dated 10/25/89, authored by Dr. Butler, is favorable for parole release. The Category X evaluation report dated 06/28/88, authored by Dr. Orling, is favorable, and indicates that prisoner's violence potential is less than average, and he is expected to remain psychiatrically stable upon release. Base term of confinement. Based upon the facts set forth above, the base offense is murder first degree, a violation of Penal Code Section 187, case number

1  
2 A-334928, count one. The term is derived from the matrix at  
3 B.P.T. rules 2282-B, and 2282-C, categories 3-B, in that no  
4 prior relationship existed between the victim and the  
5 prisoner and death was immediate. The panel assessed 204  
6 months for the base offense, and noted that this is the  
7 aggravated term due to the following. In committing the  
8 offense, prisoner subjected two other persons to serious  
9 injury or death. Under firearm enhancement, the panel  
10 assesses 24 months. Under non-life commitment, principle  
11 term, and the other term, subordinate term, those were the  
12 charges of assault with intent to commit murder with use of  
13 firearm, a violation of Penal Code Section 217 and 12022.5  
14 under case number A-334928, counts two and three, the panel  
15 assessed zero time. Panel elected not to assess any term  
16 for non-life commitments because they occurred in the same  
17 transaction as the life crime, and panel further believes  
18 that the time assessed for the base offense is appropriate  
19 for the total incident. Prior felony convictions with  
20 probation. On 01/08/77, for the offense of vehicle theft, a  
21 violation of Penal Code Section 10851 of the Vehicle Code  
22 under Los Angeles County, panel assesses a period of six  
23 months for that offense. Total term, which is the base  
24 offense, the fire enhancement, and other crimes, totals 238  
25 months. Post-conviction credit from 03/23/79 to 01/23/90 is  
26 36 months, giving a total period of confinement of 198  
27 months. Special conditions of parole include the following.  
28

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1  
2 Do not use alcoholic beverages and participate in anti-  
3 narcotic testing. The reasons for the imposition of these  
4 special conditions are that alcohol abuse was related to the  
5 incident offense.

6 BOARD COMMISSIONER BROWN: We should also add that  
7 if the prisoner is paroled to any County other than the  
8 County of commitment, that the Board of Prison Terms is to  
9 be notified by the Department of Corrections.

10 PRESIDING DEPUTY COMMISSIONER COLDREN: That's  
11 correct. And that concludes the reading of the decision.  
12 At this time I'll ask any members if they have any comments.

13 BOARD COMMISSIONER BROWN: Just wish you luck.  
14 You've got a date, now.

15 INMATE HERNANDEZ: Thank you, Mr. Brown, Mr.  
16 Coldren, Mr. Jauregui, Mr. Giss, and --

17 PRESIDING DEPUTY COMMISSIONER COLDREN: You know  
18 this has to be reviewed by --

19 INMATE HERNANDEZ: I understand.

20 PRESIDING DEPUTY COMMISSIONER COLDREN: -- our  
21 office.

22 INMATE HERNANDEZ: I understand that. And I just,  
23 you know, want to thank you again for giving me this second  
24 chance. I know the seriousness of the crime. I know what I  
25 did. And nothing, doing this time probably will never pay  
26 for what I did. And I just want to make this the last time  
27 I ever, you know, put myself in situations where I'm going  
28

65

to end up in prison again.

PRESIDING DEPUTY COMMISSIONER COLDREN: Okay. The time --

MR. GISS: For my record keeping, have I done this right, he's got 36 months to release?

BOARD COMMISSIONER BROWN: No, we don't know.

MR. GISS: Okay..

BOARD COMMISSIONER BROWN: That would have to be figured out by the records.

MR. GISS: Okay. He had 234, minus 198 for credit?

PRESIDING DEPUTY COMMISSIONER COLDREN: No, he had 234 minus 36 for credit, leaving a total period of confinement of 198.

MR. GISS: Okay.

PRESIDING DEPUTY COMMISSIONER COLDREN: And from that, records personnel will subtract any pre-conviction credit, and then any additional progress reports that can give him additional good time credits will be calculated later.

MR. GISS: Okay. Thank you.

PRESIDING DEPUTY COMMISSIONER COLDREN: Okay. The time is now 12 minutes before the hour of 11:00 o'clock, and we're going to go off record at this time.

66

CERTIFICATION AND  
DECLARATION OF TRANSCRIBER

I, LINDA LARSON, a duly designated transcriber of PRESTON'S LEGAL SUPPORT SERVICES, do hereby declare and certify under penalty of perjury that I have transcribed Tape(s) which total two in number and cover a total of pages numbered 1 - 65, and which recording was duly recorded at San Luis Obispo, California, in the Matter of SUBSEQUENT PAROLE CONSIDERATION HEARING OF PETER HERNANDEZ, on the 23rd day of January, 1990, and that the foregoing pages constitute a true, complete, and accurate transcription of the aforementioned tape(s) to the best of my ability. I hereby certify that I am a disinterested party in the above captioned matter and have no interest in the outcome of the hearing.

Dated this 14th day of May, 1990 at Sacramento, California.

Linda Larson  
LINDA LARSON  
TRANSCRIBER

-oOo-

# EXHIBIT "B"

---

SUBSEQUENT PAROLE CONSIDERATION HEARING

STATE OF CALIFORNIA

BOARD OF PRISON TERMS

**INMATE  
COPY**

In the matter of the Life )  
Term Parole Consideration )  
Hearing of: )

CDC Number C-03015

PETER HERNANDEZ )  
\_\_\_\_\_ )

CORRECTIONAL TRAINING FACILITY

SOLEDAD, CALIFORNIA

JULY 13, 2006

PANEL PRESENT:

JAMES DAVIS, Presiding Commissioner  
DENNIS SMITH, Deputy Commissioner

OTHERS PRESENT:

PETER HERNANDEZ, Inmate  
PAUL TURLEY, Deputy District Attorney  
KATERA E. RUTLEDGE, Attorney for Inmate  
CORRECTIONAL OFFICERS UNIDENTIFIED

CORRECTIONS TO THE DECISION HAVE BEEN MADE

_____	No	See Review of Hearing
_____	Yes	Transcript Memorandum

---

Patty L. Duran, Northern California Court Reporters

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--oOo--

---

P R O C E E D I N G S

1

2

DEPUTY COMMISSIONER SMITH: We're on the  
record.

3

4

PRESIDING COMMISSIONER DAVIS: This is a  
subsequent parole consideration hearing for Peter  
Hernandez, CDC number C-03015. Today's date is  
July the 13<sup>th</sup>, 2006. We're located at the  
Correctional Training Facility in Soledad. The  
inmate was received on March 23<sup>rd</sup>, 1979, from Los  
Angeles County and a life term began on March  
23<sup>rd</sup>, 1979, with a minimum eligible parole date  
of September 3<sup>rd</sup>, 1985. The controlling offense  
was the inmate had been committed of murder  
first, case number A334928, count one Penal Code  
Section 187. The inmate received a term of seven  
years to life. This hearing is being tape-  
recorded and for the purposes of voice  
identification, we'll each state our first and  
last name. When it reaches you Mr. Hernandez if  
you'll also give us your CDC number first.

21

INMATE HERNANDEZ: Yes.

22

PRESIDING COMMISSIONER DAVIS: So I'll  
start in with my left. I'm James Davis, D-A-V-I-  
S, Commissioner.

25

DEPUTY COMMISSIONER SMITH: My name is  
Dennis Smith, S-M-I-T-H. I'm Deputy  
Commissioner.

26

27

1           DEPUTY DISTRICT ATTORNEY TURLEY: Paul  
2 Turley, T-U-R-L-E-Y. DA's Office, LA County.

3           ATTORNEY RUTLEDGE: Katera E. Rutledge,  
4 R-U-T-L-E-D-G-E, Attorney for Mr. Hernandez.

5           INMATE HERNANDEZ: Peter Hernandez,  
6 Prisoner. Prisoner number C-03015.

7           DEPUTY COMMISSIONER SMITH: Spell your  
8 last name please, sir.

9           INMATE HERNANDEZ: H-E-R-N-A-N-D-E-Z.

10          DEPUTY COMMISSIONER SMITH: Thank you,  
11 sir.

12          PRESIDING COMMISSIONER DAVIS: And let  
13 the record also reflect we're joined by two  
14 Correctional Officers who are here for security  
15 purposes only and will not be actively  
16 participating in this hearing. Before we begin,  
17 Mr. Hernandez in front of you in the laminated  
18 piece of paper if you would read the Americans  
19 with Disabilities Act Statement please.

20           INMATE HERNANDEZ: "ADA,  
21 Americans with Disabilities Act. The  
22 Americans with Disability (sic) Act is  
23 a law to help people with disability,  
24 disability problems that make it hard  
25 for some people to see, hear, to read,  
26 talk, walk, learn, (inaudible), work,  
27 take care of themselves and

1 (inaudible). Nobody can be kept out of  
2 business or activities because of  
3 disability. If you have a disability  
4 you have the right to ask for help to  
5 get ready for your BPT hearing.  
6 (inaudible) hearing, talk, read forms  
7 and papers and understand that  
8 (inaudible) making sure what you ask  
9 for to make sure that you have a  
10 disability that is covered by the ADA  
11 and that you have asked for the right  
12 kind of help. If you do not get help,  
13 or if you don't think you got the kind  
14 of help you need, ask for the BPT 1074  
15 grievance form. You can also get help  
16 to fill it out."

17 PRESIDING COMMISSIONER DAVIS: That's very  
18 good. Thank you.

19 INMATE HERNANDEZ: You're welcome.

20 PRESIDING COMMISSIONER DAVIS: And I  
21 notice you were able to do that without glasses  
22 today. Do you normally wear glasses?

23 INMATE HERNANDEZ: No, I don't.

24 PRESIDING COMMISSIONER DAVIS: Good for  
25 you. And you're able to hear me all right?

26 INMATE HERNANDEZ: Yes, sir.

27 PRESIDING COMMISSIONER DAVIS: You walked

1 here today on your (inaudible)?

2 INMATE HERNANDEZ: Yes, sir.

3 PRESIDING COMMISSIONER DAVIS: All right.

4 I see we're set and ready to go?

5 INMATE HERNANDEZ: Yes, sir.

6 PRESIDING COMMISSIONER DAVIS: Excellent.

7 I notice that with regard to the 1073 form, BPT  
8 1073 form you reviewed together with staff of the  
9 institution and it being that you do not have any  
10 disability that would be qualified under the  
11 Americans with Disabilities Act. Is that  
12 correct?

13 INMATE HERNANDEZ: That's correct.

14 PRESIDING COMMISSIONER DAVIS: All right.

15 Can you think of any reason why you would not be  
16 able to actively participate in this hearing this  
17 afternoon?

18 INMATE HERNANDEZ: No, sir.

19 PRESIDING COMMISSIONER DAVIS: Okay.

20 Great. And counselor, you're also satisfied with  
21 that?

22 ATTORNEY RUTLEDGE: Yes, sir.

23 PRESIDING COMMISSIONER DAVIS: Very well.

24 You, this hearing is being conducted pursuant to  
25 Penal Code Sections 3041, 3042 and the Rules and  
26 Regulations of the Board of Prison Terms covering  
27 parole consideration terms for life inmates. The

1 purpose of today's hearing is we once again  
2 consider the number and nature of the crimes for  
3 which you were committed, your prior criminal and  
4 social history and your behavior in the  
5 programming since you were committed. We've had  
6 the opportunity to review your Central File and  
7 your prior transcripts and you'll be given an  
8 opportunity to correct or clarify the record as  
9 we proceed. We will reach a decision today and  
10 inform you of whether or not we find you suitable  
11 for parole and the reasons for our decision. If  
12 you are found suitable for parole the length of  
13 your confinement will be explained to you.  
14 Nothing that happens in today's hearing will  
15 change the findings of the court and we're not  
16 here to retry your case. The Panel is here for  
17 the sole purpose of determining your suitability  
18 for parole. Do you understand that sir?

19 **INMATE HERNANDEZ:** Yes, sir.

20 **PRESIDING COMMISSIONER DAVIS:** And the  
21 hearing will be conducted in basically two  
22 phases. First, I will discuss with you the crime  
23 for which you were committed, as well as your  
24 prior criminal and social history. And  
25 Commissioner Smith will then discuss with you  
26 your progress, your counselor's report and your  
27 psychological evaluation, as well, as well as

1 your parole plans and any letters of support or  
2 opposition, if they may exist. Once that's  
3 concluded the Commissioner, with District  
4 Attorney and your Attorney will be given an  
5 opportunity to ask you questions. Questions that  
6 come from the District Attorney will be asked  
7 through the chair and you will respond back to  
8 the Panel with your answer. Next, the District  
9 Attorney and then your Attorney and then finally  
10 you will be given an opportunity to make a  
11 closing statement. Those statements are --  
12 should focus on why you believe that you are  
13 suitable for parole. California Code of  
14 Regulations states that regardless of time served  
15 an inmate shall be found unsuitable for and  
16 denied parole if in the judgment of the Panel the  
17 inmate would pose an unreasonable risk of danger  
18 to society if released from prison. You have  
19 certain rights. Those rights include right to a  
20 timely notice of this hearing, the right to  
21 review your Central File and the right to present  
22 relevant documents. Counselor, are you satisfied  
23 that your client's rights have been met today?

24 **ATTORNEY RUTLEDGE:** Yes, sir.

---

25 **PRESIDING COMMISSIONER DAVIS:** All right.  
26 Mr. Hernandez, you also have an additional right  
27 and that is to be heard by an impartial Panel.

1 Now you've heard Mr. Smith and I introduce  
2 ourselves today. Do you have any reason to  
3 believe that we would not be impartial?

4 INMATE HERNANDEZ: No, sir.

5 PRESIDING COMMISSIONER DAVIS: ,Thank you.  
6 And you will receive a written copy of our  
7 tentative decision today. That decision becomes  
8 effect within 120 days. A copy of the decision  
9 and a copy of the transcript will be sent to you.  
10 You are not required to admit your offense today  
11 or discuss your offense, however the Panel does  
12 accept the findings of the court to be true. Do  
13 you understand that?

14 INMATE HERNANDEZ: Yes, sir.

15 PRESIDING COMMISSIONER DAVIS: Great.  
16 The Board has (inaudible) process. If you  
17 disagree with anything in today's hearing you  
18 have the right to go directly to court with your  
19 complaint. Mr. Smith, we going to be dealing  
20 with anything from the confidential file  
21 (inaudible)?

22 DEPUTY COMMISSIONER SMITH: No, we will  
23 not.

24 PRESIDING COMMISSIONER DAVIS: Okay. I'm  
25 going to pass the checklist of documents to both  
26 counsel. If you would take a look at this and  
27 make sure we're offering you all the same list of

1 documents.

2 DEPUTY DISTRICT ATTORNEY TURLEY: I have  
3 those.

4 ATTORNEY RUTLEDGE: Yes, sir. Thank you.  
5 We have the document.

6 PRESIDING COMMISSIONER DAVIS: All right.  
7 Thank you. Those will be marked as Exhibit 1  
8 then. (inaudible). Ms. Rutledge, any additional  
9 documents that you'd like us to consider today?

10 ATTORNEY RUTLEDGE: No, sir.

11 PRESIDING COMMISSIONER DAVIS: Any  
12 preliminary objections?

13 ATTORNEY RUTLEDGE: We would just note  
14 that Mr. Hernandez's hearing should have been in  
15 December of last year. Is that correct?

16 INMATE HERNANDEZ: About, yes.

17 ATTORNEY RUTLEDGE: But, so it's about  
18 what, eight months behind?

19 PRESIDING COMMISSIONER DAVIS: It is.

20 ATTORNEY RUTLEDGE: Okay. We just wanted  
21 to note for the record that is beings (sic)  
22 approximately eight months behind.

23 PRESIDING COMMISSIONER DAVIS: We -- we  
24 apologize for the delay Mr. Hernandez.

---

25 INMATE HERNANDEZ: Okay.

26 PRESIDING COMMISSIONER DAVIS: Will your  
27 client be speaking with us today?

1 ATTORNEY RUTLEDGE: Yes.

2 DEPUTY COMMISSIONER SMITH: Actually if I  
3 can correct that. His last hearing was in  
4 January of '05.

5 ATTORNEY RUTLEDGE: Oh.

6 DEPUTY COMMISSIONER SMITH: So, so we're  
7 roughly six months --

8 ATTORNEY RUTLEDGE: Yeah.

9 DEPUTY COMMISSIONER SMITH: -- past.  
10 That was last year.

11 ATTORNEY RUTLEDGE: Okay. Thank you.

12 DEPUTY COMMISSIONER SMITH: You're  
13 welcome.

14 ATTORNEY RUTLEDGE: There was another  
15 question you had.

16 PRESIDING COMMISSIONER DAVIS: Will --  
17 will Mr. Hernandez be speaking with us today?

18 ATTORNEY RUTLEDGE: Yes, sir. He'll be  
19 speaking with you on all subjects and issues.

20 PRESIDING COMMISSIONER DAVIS: Very well.  
21 Mr. Hernandez, would you raise your right hand  
22 please, sir? Do you solemnly swear that the  
23 testimony you will give at the hearing today will  
24 be the truth and nothing but the truth?

---

25 INMATE HERNANDEZ: Yes, sir.

26 PRESIDING COMMISSIONER DAVIS: Okay. All  
27 right. Without objection I'm going to

1 incorporate by reference the court of appeals  
2 document from April 21<sup>st</sup>, 1981, pages through,  
3 through 8, pages 3 through 8. And they refer to  
4 the summary of the ward report of the 2004  
5 calendar starting on page 1 where it states under  
6 (a)1. Summary of the crime:

7 "On 4-25-77 at approximately 9:00  
8 p.m. Peter Hernandez and co-  
9 defendant Jose Montez approached  
10 three Mexican-American males in a  
11 residential area of Los Angeles.  
12 Following a brief conversation  
13 Hernandez pulled a gun from his  
14 coat, fired a shot at victim Tony  
15 Sanchez, S-A-N-C-H-E-Z, at point  
16 blank range killing him with a shot  
17 to the heart. Victims Rosales and  
18 Rodriguez, R-O-S-A-L-E-S, and  
19 Rodriguez, R-O-D-R-I-G-U-E-Z, ran  
20 from the scene, but were pursued by  
21 Hernandez who continued firing the  
22 gun striking both men in the leg as  
23 crime partner Montez, M-O-N-T-E-Z,  
24 yelled, 'Get them, get them'. After  
25 emptying the weapon Hernandez and  
26 Montez returned to the van that  
27 Hernandez had been driving and fled

1 the scene. Hernandez was later  
2 identified by the wounded victims.  
3 He and Montez were apprehended at  
4 their residences on the following  
5 morning. Subsequent investigation  
6 revealed that Hernandez had  
7 attempted to purchase marijuana from  
8 the victims and when advised that  
9 they had none opened fire. Both  
10 Hernandez and Montez denied any  
11 involvement in the crime maintaining  
12 this denial through three trials,  
13 the third of which resulted in  
14 Hernandez's conviction for the  
15 present case and Montez's conviction  
16 for murder second degree. It was  
17 noted that all three victims were  
18 known gang members and that the  
19 motive for the crime was believed by  
20 the District Attorney's Office to  
21 have been gang related. Hernandez  
22 continued to maintain his innocence  
23 until exhaustion of all fuels  
24 processed at which time he admitted  
25 his guilt and the information for  
26 this came from the 61588 diagnostic  
27 being the evaluation pages 2 through

1 3 and the Probation Officer's quote  
2 pages 5 through 7 and a (inaudible)  
3 decision made on 6-28-1 pages 8  
4 through 12 and 14 through 15."

5 So, Mr. Hernandez, did you commit this  
6 crime?

7 INMATE HERNANDEZ: Yes, sir.

8 PRESIDING COMMISSIONER DAVIS: Now I know  
9 that you have a, a fairly comprehensive statement  
10 in this 2004 report as well. Why don't you tell  
11 me in your own words what happened?

12 INMATE HERNANDEZ: That afternoon I'd  
13 stopped work and, well a few weeks prior my  
14 sister's house was burglarized. We know what,  
15 when was the --

16 DEPUTY DISTRICT ATTORNEY TURLEY: Excuse  
17 me, please. Could you ask him if he could speak  
18 up just a little bit? He's (inaudible).

19 PRESIDING COMMISSIONER DAVIS:  
20 (inaudible).

21 INMATE HERNANDEZ: (inaudible).

22 PRESIDING COMMISSIONER DAVIS: (inaudible)  
23 this.

24 ATTORNEY RUTLEDGE: You (inaudible).

---

25 PRESIDING COMMISSIONER DAVIS: You also --

26 INMATE HERNANDEZ: This is not  
27 (inaudible).

1           PRESIDING COMMISSIONER DAVIS: (inaudible)  
2     get you some water.

3           INMATE HERNANDEZ: Thank you. Two weeks  
4     prior my sister's house had been burglarized and  
5     we had made police reports about it, about the  
6     burglary and at that time I (inaudible) I had low  
7     confidence in the police being able to find out  
8     who it was. I thought that how, how it would be  
9     easier for me to look around and find out more or  
10    less anybody was involved in the burglary. I run  
11    down every idea that I -- there's a lot of gangs,  
12    kids in gangs, people running around doing all  
13    kinds of things like that. So that afternoon  
14    that I got off, got off of work one, one of the  
15    friends that I, a (inaudible) told me he say, he  
16    told me that he thought that he knew the person  
17    that had the property I was looking for. Cause I  
18    had, I had told most of the persons in, in the,  
19    in the neighborhood, the things that were missing  
20    from my sister's home and that I had to have  
21    them, that I needed to get them back. When he  
22    told me that he knew more or less the person  
23    could have these, these belongings then I told  
24    him, "Let's go over there and, and look for  
25    them." And that's what we did. We went over  
26    there and it must have been I think about six  
27    o'clock in the afternoon, something like that.

1 And then I (inaudible) I got to the, to the  
2 neighborhood and I spoke to one of the guys there  
3 and asked him for, for, for a person by the name,  
4 of Tito that lived around there and he told me,  
5 "Yes." He pointed to a green house and said, "He  
6 lives over there." So I went over there to the  
7 house. At that point there were three gentlemen  
8 that I believe (inaudible) on the porch and one  
9 of them came down to the fence as I went to the  
10 fence and then he asked me, you know, what I  
11 wanted. I told him that I was looking for Tito  
12 and he told me that, first he said, "What for?"  
13 as I recall and I told him, "Because I, I  
14 understand he has some, some hot things for  
15 sale." He said, "Well who told you that?" I  
16 said that I just needed to talk to him. And at  
17 that point one of the other, the guy at the  
18 corner had told where the house was, came, came on  
19 to the site and he says, "This guy's looking for  
20 Tito." And he goes, "Yeah, I know." So the, the  
21 other person that was on the porch came down and  
22 then he, and he, and he talked to -- so that guy  
23 asked him what I, what I want and, and he says,  
24 "He's looking for Tito for some hot stuff that he  
25 says he's trying to, he's trying to get." He  
26 said, "No, we don't have nothing like that." So  
27 he says, "Who are you anyway?" I said well, "I

15.

1 don't know him that much, but you know." He  
2 said, "No, you get out of here." And I said,  
3 "Wait a minute I'm not leaving till I see him."  
4 He says. "You better get out of here." And he  
5 pulled out a weapon on me and he pointed it  
6 towards me and I said. "Okay, no problem."  
7 Probably I, so I, I got in the van and left. A  
8 partner, a friend of mine was with me, he told  
9 me, "You know what, you shouldn't let him get  
10 away with that." I know where's a gun, so we'll  
11 get a gun and we'll come back. And I said, "You  
12 know what, okay, let's do it." And so we went  
13 over there and he went to go see some friends, he  
14 came back and he said, "Here, I got a gun." And,  
15 and I said. "Okay, let me have it." Then I got  
16 it and put it in my jacket pocket. At that point  
17 I drove back to that area. I passed through the  
18 house, I didn't see nobody there. As I was going  
19 by the, as I was going to the corner and I saw  
20 three individuals that were standing by, by the  
21 corner market store and when I, when I passed  
22 through slow I took a look at them then I noticed  
23 that at least two of them were the same ones that  
24 I was talking to. So then I went around, parked  
25 the van, came back and then confronted them.  
26 Crossed the street in front of them and, and the  
27 first person -- happened to be people that was

1 standing. I didn't know at that time because I  
2 didn't know (inaudible). So when, when, when I  
3 went, came to the, to the parked cars onto the  
4 sidewalk he kind of like went back and was  
5 surprised to see us. And goes, "Who are you?" I  
6 said, "I'm looking for Tito." He says, "Well  
7 what do you want from him?" I said, "I'm looking  
8 because he has some belongings that, that belong  
9 to me." He says, "No, no, no." He says, "What  
10 are you talking about." I said, "You have an  
11 amplifier that, that (inaudible) were," excuse  
12 me, "those were the things that were, that were  
13 missing after the burglary. So I'm, I'm looking  
14 for an amplifier and a, and a, and a color TV and  
15 a guitar." He said. "No we don't have none of  
16 this. Just get out of here." At that point he  
17 came toward me and he had his hand in his pocket.  
18 And I had my, my weapon in my pocket also. My,  
19 my hand was in there. So when he took two, I  
20 recall two or three steps towards me I just  
21 pulled the gun out and I fired. At that point,  
22 after the, after the, the first shot I felt the  
23 other guys get up and I just turned around and,  
24 and, and I fired at them. And they began to run  
25 and till this day I, I couldn't remember my, my,  
26 my partner saying, "Get him", or anything. I  
27 was, I don't know, I, I just didn't, didn't feel

1 right and I kept firing till the gun went empty  
2 and then I ran to, to the van and, and you know,  
3 we got, I was shaking very, very hard and I, I  
4 don't remember what I told my partner or  
5 anything. I just, just go, "You know, we got to  
6 get out of here." And I left.

7 PRESIDING COMMISSIONER DAVIS: The, the  
8 gun that you got, do you have any idea who, who  
9 that came from?

10 INMATE HERNANDEZ: It was some  
11 apartments, but I waited outside and my crime  
12 partner only went up there and got it.

13 PRESIDING COMMISSIONER DAVIS: Had you  
14 ever gotten a gun from that apartment before?

15 INMATE HERNANDEZ: No.

16 PRESIDING COMMISSIONER DAVIS: What kind  
17 of gun was it?

18 INMATE HERNANDEZ: I think it was a,  
19 looked like a nine millimeter.

20 PRESIDING COMMISSIONER DAVIS: Did you  
21 check and make sure it was loaded?

22 INMATE HERNANDEZ: You know, no, I  
23 didn't.

24 PRESIDING COMMISSIONER DAVIS: Had you  
25 ever fired that kind of gun before?

26 INMATE HERNANDEZ: No. No, I hadn't.

27 PRESIDING COMMISSIONER DAVIS: So you had

# **EXHIBIT A**

## **Part 2 of 2**

1 no idea it was going to work or not?

2 INMATE HERNANDEZ: No, I didn't.

3 PRESIDING COMMISSIONER DAVIS: Did you  
4 test it?

5 INMATE HERNANDEZ: No, I didn't.

6 PRESIDING COMMISSIONER DAVIS: So you went  
7 back and, and confronted the, confronted the  
8 person who turned out to be Tito. Was that the  
9 same person that had the weapon before?

10 INMATE HERNANDEZ: No, it wasn't.

11 PRESIDING COMMISSIONER DAVIS: Did you see  
12 a weapon on Tito?

13 INMATE HERNANDEZ: No, I didn't.

14 PRESIDING COMMISSIONER DAVIS: The other  
15 people who were there that you fired at, did you  
16 see any weapons that they might have had?

17 INMATE HERNANDEZ: No, sir.

18 PRESIDING COMMISSIONER DAVIS: Were either  
19 one of them the, the person who had the weapon  
20 before?

21 INMATE HERNANDEZ: Yes. One of them was.

22 PRESIDING COMMISSIONER DAVIS: One of them  
23 was. But you didn't see it the second time,  
24 correct?

---

25 INMATE HERNANDEZ: No, I didn't.

26 PRESIDING COMMISSIONER DAVIS: After all  
27 of this happened, as you shot Tito, you shot the

1 other people, got back in the van and took off,  
2 what did you do after that?

3 INMATE HERNANDEZ: Yeah. We ran and  
4 bought some beer.

5 PRESIDING COMMISSIONER DAVIS: Okay. You  
6 ran and bought some beer, then what?

7 INMATE HERNANDEZ: And then, and then I  
8 went home.

9 PRESIDING COMMISSIONER DAVIS: Then what  
10 did you do?

11 INMATE HERNANDEZ: I remember going to  
12 the restroom.

13 PRESIDING COMMISSIONER DAVIS: What did  
14 you do with the gun?

15 INMATE HERNANDEZ: Oh the gun, I gave it  
16 back to my crime partner.

17 PRESIDING COMMISSIONER DAVIS: So you  
18 returned it?

19 INMATE HERNANDEZ: Uh-huh. Yes, sir.

20 PRESIDING COMMISSIONER DAVIS: When did  
21 the police arrive?

22 INMATE HERNANDEZ: As I recall it was  
23 very early in the morning. Could have been two  
24 in the morning. Something like that.

---

25 PRESIDING COMMISSIONER DAVIS: What  
26 happened that evening? For you, what happened,  
27 what did you do?

1           INMATE HERNANDEZ: Well after I went  
2 back, it was about I think ten o'clock, eleven,  
3 then I just, I went to bed.

4           PRESIDING COMMISSIONER DAVIS: Did you  
5 ever find out if these people were in any way,  
6 shape or form associated with the original  
7 burglary that you were trying to recover the  
8 stuff for your sister?

9           INMATE HERNANDEZ: No.

10          PRESIDING COMMISSIONER DAVIS: That never  
11 came out? All right. When you didn't have  
12 confidence in the police to find the, the, the  
13 equipment once you had tracked down some of this  
14 information did you ever think about calling them  
15 and giving them that information?

16          INMATE HERNANDEZ: No, sir.

17          PRESIDING COMMISSIONER DAVIS: In terms of  
18 personal factors, you were born in Las Cruces,  
19 New Mexico, you're the second of two children,  
20 and if I say anything in here that isn't right or  
21 doesn't, isn't right on point please let me know.

22          INMATE HERNANDEZ: Yes, sir.

23          PRESIDING COMMISSIONER DAVIS: We'll  
24 correct that as we go along. You were raised by  
25 your mother in part and your, in part because  
26 your parents divorced when you were two years  
27 old, so you were raised by your mom?

1 INMATE HERNANDEZ: Yes, sir.

2 PRESIDING COMMISSIONER DAVIS: And have a  
3 good relationship with all your family members  
4 and a stepfather and two half brothers?

5 INMATE HERNANDEZ: Yes, sir.

6 PRESIDING COMMISSIONER DAVIS: No other  
7 family members have a problem with any arrest  
8 record or mental health issues, anything like  
9 that?

10 INMATE HERNANDEZ: No, sir.

11 PRESIDING COMMISSIONER DAVIS: But this  
12 indicates that your stepfather's an alcoholic.

13 INMATE HERNANDEZ: Yes, sir.

14 PRESIDING COMMISSIONER DAVIS: And how do  
15 you know that?

16 INMATE HERNANDEZ: Because he used to  
17 drink a lot. He was a hardworking man, but he'd  
18 always --

19 PRESIDING COMMISSIONER DAVIS: So he  
20 would -- did he abuse you at all?

21 INMATE HERNANDEZ: No. He, he never --  
22 he was --

23 PRESIDING COMMISSIONER DAVIS: Was a,  
24 wasn't a mean drunk then?

---

25 INMATE HERNANDEZ: No. He'd just come  
26 home, drink his beer --

27 PRESIDING COMMISSIONER DAVIS: Okay.

1           INMATE HERNANDEZ: -- and goes out on  
2 the, the couch.

3           PRESIDING COMMISSIONER DAVIS: Okay. And  
4 so for all this purposes you had a -- had a  
5 pretty normal childhood then?

6           INMATE HERNANDEZ: Yes. Yes.

7           PRESIDING COMMISSIONER DAVIS: You  
8 attended Belmont High School?

9           INMATE HERNANDEZ: Yes, sir.

10          DEPUTY COMMISSIONER SMITH: (inaudible)  
11 about that.

12          PRESIDING COMMISSIONER DAVIS: And you  
13 dropped out to enlist in the United States Army?

14          INMATE HERNANDEZ: Yes, sir.

15          PRESIDING COMMISSIONER DAVIS: And you  
16 served in the army from 2/73 until 2 of '76 and  
17 received an honorable discharge?

18          INMATE HERNANDEZ: Yes, sir.

19          PRESIDING COMMISSIONER DAVIS: Received,  
20 received the rank, or actually earned, it says  
21 you earned the rank of an E4 and served seven  
22 months in Germany while in the army?

23          INMATE HERNANDEZ: Yes, sir.

24          PRESIDING COMMISSIONER DAVIS: And it was  
25 in Germany that you began the occasional use of  
26 alcohol and marijuana?

27          INMATE HERNANDEZ: Yes, sir.

1           PRESIDING COMMISSIONER DAVIS: And you  
2   said, well you began spending most of your time  
3   off duty drinking. Let me tell you, your first  
4   experience with alcohol was when you entered,  
5   after you entered the army? Or had you drunk,  
6   had you consumed alcohol before that?

7           INMATE HERNANDEZ: Yes, but not much like  
8   in a way I didn't --

9           PRESIDING COMMISSIONER DAVIS: Okay.

10          INMATE HERNANDEZ: Very, very little.

11          PRESIDING COMMISSIONER DAVIS: So it was  
12   in the army that you began to, well as abuse  
13   alcohol?

14          INMATE HERNANDEZ: Yeah.

15          PRESIDING COMMISSIONER DAVIS: In 1975 you  
16   married Ms. Garcia and while you were in the  
17   army, and you had one daughter?

18          INMATE HERNANDEZ: Yes.

19          PRESIDING COMMISSIONER DAVIS: Are you  
20   still married?

21          INMATE HERNANDEZ: No, sir.

22          PRESIDING COMMISSIONER DAVIS: No? When  
23   did that, when did that marriage end?

24          INMATE HERNANDEZ: Approximately seven  
25   years.

26          PRESIDING COMMISSIONER DAVIS: You  
27   staying, you stay in touch with your daughter?

1 INMATE HERNANDEZ: Yes, sir.

2 PRESIDING COMMISSIONER DAVIS: How, how do  
3 you stay in touch with her? Letters, phone  
4 calls?

5 INMATE HERNANDEZ: Yes, sir.

6 PRESIDING COMMISSIONER DAVIS: Okay.  
7 Where does she live?

8 INMATE HERNANDEZ: She lives right now in  
9 El Paso, Texas.

10 PRESIDING COMMISSIONER DAVIS: So how  
11 often --

12 INMATE HERNANDEZ: (inaudible)

13 PRESIDING COMMISSIONER DAVIS: -- were you  
14 able, are you able to talk with her?

15 INMATE HERNANDEZ: Once a month.

16 PRESIDING COMMISSIONER DAVIS: How's she  
17 doing?

18 INMATE HERNANDEZ: She's doing fine.

19 PRESIDING COMMISSIONER DAVIS: What grade  
20 did you drop out of high school?

21 INMATE HERNANDEZ: Ninth grade.

22 PRESIDING COMMISSIONER DAVIS: The ninth  
23 grade? Why did you do that?

24 INMATE HERNANDEZ: It was during the

---

25 summer, I got a job during the summer and I was  
26 getting a little money and I was saving up and I  
27 was, I was helping my, my mom and then it, it

1 just drove me from, from school.

2 PRESIDING COMMISSIONER DAVIS: Huh.

3 INMATE HERNANDEZ: I said why should I go  
4 back if I can make (inaudible). And then about a  
5 year and a half later after I was working then I  
6 tried to enlist in the, in the army so I can get  
7 some education.

8 PRESIDING COMMISSIONER DAVIS: So that was  
9 the purpose, you wanted to, you wanted to  
10 complete your education?

11 INMATE HERNANDEZ: That was one of the  
12 purposes.

13 PRESIDING COMMISSIONER DAVIS: Were you  
14 involved in any gang activity or anything at that  
15 time?

16 INMATE HERNANDEZ: No, sir.

17 PRESIDING COMMISSIONER DAVIS: No?

18 DEPUTY DISTRICT ATTORNEY TURLEY: Ever?

19 PRESIDING COMMISSIONER DAVIS: Ever?

20 INMATE HERNANDEZ: Never.

21 PRESIDING COMMISSIONER DAVIS: No never?

22 INMATE HERNANDEZ: No.

23 PRESIDING COMMISSIONER DAVIS: All right.

24 In terms of an arrest record, looks like you  
25 were, no juvenile history that is known. You're  
26 arrested by Los Angeles, LAPD in, on 1/8 of 1977  
27 for first-degree robbery. You pled guilty to, to

1 auto theft. You were placed on 36 months summary  
2 probation without supervision and ordered to pay  
3 a fine. What was, what was the, what were the  
4 circumstances of that?

5 INMATE HERNANDEZ: I -- I took a, a  
6 taxicab.

7 PRESIDING COMMISSIONER DAVIS: Okay.  
8 While the taxicab driver was in it?

9 INMATE HERNANDEZ: No. She just got, she  
10 got off --

11 PRESIDING COMMISSIONER DAVIS: Okay.

12 INMATE HERNANDEZ: -- and that's when I  
13 took the cab.

14 PRESIDING COMMISSIONER DAVIS: Okay. She  
15 got out and you got in and took the cab?

16 INMATE HERNANDEZ: Yeah.

17 PRESIDING COMMISSIONER DAVIS: Was it a  
18 (inaudible)? What'd you do that for?

19 INMATE HERNANDEZ: It, it was stupid now.  
20 I was drinking, we had been drinking that night  
21 and it was on a Saturday night I believe.

22 PRESIDING COMMISSIONER DAVIS: Okay. You  
23 needed a ride home?

24 INMATE HERNANDEZ: Actually I did have, I  
25 had money, I had enough money I could have paid  
26 for it.

27 PRESIDING COMMISSIONER DAVIS: Okay. How

27.

1 much had you had to drink before you stole the  
2 cab?

3 INMATE HERNANDEZ: See I got to that  
4 party at about seven o'clock. I had quite,  
5 probably three.

6 PRESIDING COMMISSIONER DAVIS: So, and  
7 this is during the time, you're still in the army  
8 at this time?

9 INMATE HERNANDEZ: No. No, sir.

10 PRESIDING COMMISSIONER DAVIS: You were  
11 out of the army at this time?

12 INMATE HERNANDEZ: Yes.

13 PRESIDING COMMISSIONER DAVIS: Okay. And  
14 you're arrested in, on 4/26 of 1977 that actually  
15 be for the (inaudible) offense, but now in, this  
16 says in, in 1978 there was an arrest for, by the  
17 LAPD for shoplifting?

18 INMATE HERNANDEZ: Yes.

19 PRESIDING COMMISSIONER DAVIS: What was  
20 that about?

21 INMATE HERNANDEZ: I attempted to steal  
22 some glasses. Well, I did steal them.

23 PRESIDING COMMISSIONER DAVIS: Okay. And  
24 then another contact with LAPD for drinking in  
25 public?

26 INMATE HERNANDEZ: Yes, sir.

27 PRESIDING COMMISSIONER DAVIS: So just

1 the, the one incident where you actually, you  
2 received summary probation as well for the  
3 shoplifting, so you're placed in probation?

4 INMATE HERNANDEZ: Yes.

5 PRESIDING COMMISSIONER DAVIS: Was that --  
6 alcohol have anything to do with the shoplifting  
7 incident also?

8 INMATE HERNANDEZ: Yes.

9 PRESIDING COMMISSIONER DAVIS: So there  
10 was a thread running consistently through this?

11 INMATE HERNANDEZ: Yes.

12 PRESIDING COMMISSIONER DAVIS: What about  
13 drug use?

14 INMATE HERNANDEZ: I stay away from  
15 drugs.

16 PRESIDING COMMISSIONER DAVIS: So you  
17 (inaudible) that you smoked marijuana.  
18 occasionally starting at age 19?

19 INMATE HERNANDEZ: Yes, sir.

20 PRESIDING COMMISSIONER DAVIS: But no  
21 other substances?

22 INMATE HERNANDEZ: No.

23 PRESIDING COMMISSIONER DAVIS: No  
24 cocaine, no methamphetamine? Nothing like that?

---

25 INMATE HERNANDEZ: Yes.

26 PRESIDING COMMISSIONER DAVIS: Just the  
27 alcohol? The alcohol, so be fair to say that

1 alcohol was drug of choice at that time?

2 INMATE HERNANDEZ: Yes, sir.

3 PRESIDING COMMISSIONER DAVIS: Is there  
4 anything that we haven't talked about, about the,  
5 the offense itself, your history prior to coming  
6 to the institution, your arrests, anything prior  
7 to the incident offense that, or actually the  
8 incident that your, actually prior to you coming  
9 to the institution, that we haven't talked about  
10 that you feel is important for this Panel to  
11 understand?

12 INMATE HERNANDEZ: I was arrested twice  
13 as a juvenile --

14 PRESIDING COMMISSIONER DAVIS: Okay.

15 INMATE HERNANDEZ: -- for truancy and I  
16 don't think that -- that that was mentioned.

17 PRESIDING COMMISSIONER DAVIS: Right.  
18 Right. I appreciate you bringing that up. And  
19 you were a truant, why?

20 INMATE HERNANDEZ: I just didn't want to  
21 go to school.

22 PRESIDING COMMISSIONER DAVIS: Just didn't  
23 want to go to school?

24 INMATE HERNANDEZ: (inaudible).

---

25 PRESIDING COMMISSIONER DAVIS: Did you  
26 get along all right in school?

27 INMATE HERNANDEZ: Yeah I, I did. It was

1 a (sic) inter, interracial at that time kind of a  
2 thing going on in school.

3 PRESIDING COMMISSIONER DAVIS: With just  
4 the --

5 INMATE HERNANDEZ: Majority blacks so  
6 real, real an interracial (sic). But it, I had no  
7 problems in school. As a matter of fact I kind  
8 of like it, but I kind of let influences, you  
9 know, of other people around.

10 PRESIDING COMMISSIONER DAVIS: Was it  
11 just your general peer group that was doing the  
12 influencing?

13 INMATE HERNANDEZ: Yeah. A few. But I  
14 was mostly interested in sports. But, yeah.

15 PRESIDING COMMISSIONER DAVIS: Had you  
16 been drinking prior to the incident offense?

17 INMATE HERNANDEZ: Yes, sir.

18 PRESIDING COMMISSIONER DAVIS: How much?

19 INMATE HERNANDEZ: Well, I got off of  
20 work, cashed my check. I had about six of those  
21 beers.

22 PRESIDING COMMISSIONER DAVIS: Okay.

23 INMATE HERNANDEZ: And --

24 PRESIDING COMMISSIONER DAVIS: Just you

---

25 personally or were you sharing it with your  
26 friends?

27 INMATE HERNANDEZ: No. Just for me.

1           PRESIDING COMMISSIONER DAVIS:   Okay.

2           INMATE HERNANDEZ:   But the park that I  
3   went to there was persons there that I'd give  
4   them a beer.   Yeah.

5           PRESIDING COMMISSIONER DAVIS:   But you  
6   didn't drink a whole six-pack yourself?

7           INMATE HERNANDEZ:   No.   I must have given  
8   away three or four.

9           PRESIDING COMMISSIONER DAVIS:   Okay.. Was  
10   that, was that the, the extent that you're, that  
11   you'd been at work, you hadn't been drinking  
12   during the time you're at work?

13          INMATE HERNANDEZ:   No.

14          PRESIDING COMMISSIONER DAVIS:   Okay.   So  
15   you were drinking after work (inaudible) --

16          INMATE HERNANDEZ:   Yeah.   After my  
17   work --

18          PRESIDING COMMISSIONER DAVIS:   Three or  
19   four beers.

20          INMATE HERNANDEZ:   -- usually I would  
21   (inaudible) after I got off of work.   First thing  
22   I do is stop at a liquor store and buy, you know,  
23   a six pack or, at that time they had tall boys,  
24   maybe a couple of tall boys.

---

25          PRESIDING COMMISSIONER DAVIS:   Okay.   So  
26   in addition to a six-pack you had a couple of  
27   tall boys too?

1 INMATE HERNANDEZ: Yes.

2 PRESIDING COMMISSIONER DAVIS: Okay. So  
3 how would you describe your ability to make good  
4 judgments and so forth about the time that you  
5 were, decided to go and check on this property  
6 yourself?

7 INMATE HERNANDEZ: Very bad. I just, it  
8 was a bad, real bad (inaudible).

9 PRESIDING COMMISSIONER DAVIS: It almost  
10 seems like a pretty dangerous thing to have done  
11 to go into a neighborhood that you weren't  
12 familiar with and confront somebody about some  
13 property.

14 INMATE HERNANDEZ: Some (inaudible) it  
15 is, it was dangerous.

16 PRESIDING COMMISSIONER DAVIS:  
17 (inaudible).

18 INMATE HERNANDEZ: But at that time my  
19 reasoning was not, not of someone that's, you  
20 know, capable to understand the consequences.

21 PRESIDING COMMISSIONER DAVIS: The person  
22 that you were with that day, was he a gang  
23 member?

24 INMATE HERNANDEZ: No, sir.

---

25 PRESIDING COMMISSIONER DAVIS: Anything  
26 else that we haven't talked about that you feel  
27 is, is important for us to understand today?

1 INMATE HERNANDEZ: I don't understand  
2 that.

3 PRESIDING COMMISSIONER DAVIS: Is -- is  
4 there anything that we haven't covered that,  
5 that, anything about your, your past history,  
6 your family life, any other influences on you,  
7 things like that that you think would be  
8 important for us to, to review and --

9 INMATE HERNANDEZ: Oh.

10 PRESIDING COMMISSIONER DAVIS: -- and  
11 understand as we're going through all the  
12 information?

13 INMATE HERNANDEZ: Just that I've always  
14 tried, you know, to, to be the best I could. I  
15 was always protective of my family and the area  
16 that, that I live and where I come from -- one of  
17 the other reasons I went into the military is  
18 cause I didn't want to get involved with, you  
19 know, the atmosphere at that time going around  
20 the (inaudible) and I wanted to, to be the first  
21 one other than my sister to be able to help our  
22 family find a better place to -- to live. And I  
23 let everybody down because it's hard to do  
24 anything. That just became my --

---

25 PRESIDING COMMISSIONER DAVIS: How did  
26 you feel when they, when you were confronted with  
27 a gun the first time when he pointed the gun at

1 you and, and you had to leave?

2 INMATE HERNANDEZ: I felt scared  
3 personally when -- when he pulled the gun out.

4 PRESIDING COMMISSIONER DAVIS: How about  
5 after you'd already left? How'd you feel then?

6 INMATE HERNANDEZ: Felt anger and sort of  
7 like, well nobody does this to me, you know.

8 PRESIDING COMMISSIONER DAVIS: Feel  
9 insulted, disrespected?

10 INMATE HERNANDEZ: Yes, sir. Very much.  
11 So when my partner came with the idea of a gun I  
12 made, says let's go.

13 PRESIDING COMMISSIONER DAVIS: Any  
14 questions, Commissioner?

15 DEPUTY COMMISSIONER SMITH: Just that a  
16 question of -- of clarification. When  
17 Commissioner Davis asked you earlier -- earlier  
18 if your knew what kind of a gun it was, you --  
19 you said you didn't know. You thought it might  
20 have been nine millimeter?

21 INMATE HERNANDEZ: Yes.

22 DEPUTY COMMISSIONER SMITH: In, in the  
23 (inaudible) report when, when you were discussing  
24 the commitment offense you'd indicated that when  
25 you were in the army that you were trained with a  
26 .45 caliber?

27 INMATE HERNANDEZ: Yes, sir.

35

1           DEPUTY COMMISSIONER SMITH: And when in  
2 fact you had earned an expert badge --

3           INMATE HERNANDEZ: Yes, sir.

4           DEPUTY COMMISSIONER SMITH: -- in that  
5 weapon?

6           INMATE HERNANDEZ: Yes, sir.

7           DEPUTY COMMISSIONER SMITH: I'm a little  
8 confused by some one that would have earned an  
9 expert badge shooting a .45 caliber wouldn't know  
10 the difference between a nine millimeter, nine  
11 millimeter and a .45. I mean they're  
12 dramatically different.

13          INMATE HERNANDEZ: Of course. It wasn't  
14 a .45. I knew that. And the, the only reason it  
15 was a nine millimeter that I became aware of just  
16 through after the, you know, the arrest and all.

17          DEPUTY COMMISSIONER SMITH: Okay. So you  
18 knew what it wasn't, you weren't sure what it  
19 was?

20          INMATE HERNANDEZ: Yes.

21          DEPUTY COMMISSIONER SMITH: Okay. Great.  
22 I appreciate the clarification. Thank you.

23          PRESIDING COMMISSIONER DAVIS: Any further  
24 questions?

---

25          DEPUTY COMMISSIONER SMITH: No.

26          PRESIDING COMMISSIONER DAVIS: All right.  
27 I'll ask you to turn your attention, please, to

1 Commissioner Smith.

2 DEPUTY COMMISSIONER SMITH: (inaudible)  
3 to the C File you were received at the Department  
4 of Corrections on, on March 23<sup>rd</sup>, 1979. Received  
5 here at CTF on June 24<sup>th</sup>, 1998. You have a  
6 classification score of 19, which is the lowest  
7 classification score that a life inmate can  
8 attain. Your last hearing was held on January 6,  
9 2005. You received a one-year denial and that  
10 was your twelfth subsequent hearing. Since  
11 you've been incarcerated you generally had a  
12 positive adjustment history. You've had seven  
13 CDC 128A's, the last one being in December of  
14 2000 for disobeying staff. And I would have at  
15 that part frankly where although you only have  
16 seven 128's (inaudible) having been incarcerated  
17 for as long as you have been and you've gone  
18 through the number of parole hearings that you've  
19 gone, gone through that you would have, worked  
20 very hard to avoid even a 128. I mean although  
21 that's roughly five years ago, it's still  
22 relatively current. I'm a little surprised by  
23 that. You've had only four CDC 115's, and the  
24 last one being December of '98 and that was from  
25 mutual combat and, and three of the four 115's  
26 had to do with fighting or mutual combat, which  
27 was not simply you, you know, failing to report

1 for work or failing to follow instructions or, or  
2 something of that, that nature. You've received  
3 two certificates of completion in the Infectious  
4 Disease curriculum. One in Sexually Transmitted  
5 Infections and that's dated November of 2005.  
6 The other Hepatitis and that's dated February of  
7 2006. And you received a Certificate of  
8 Completion in Entrepreneurship, that was November  
9 of 2005. I haven't seen that before. What is  
10 that? What is the basis of that program?

11 INMATE HERNANDEZ: Oh it's to start  
12 getting into the, into the world of business and  
13 how to, the basics of starting a business.  
14 The -- the investment that you have to make.  
15 The -- the difference between a franchising and a  
16 sole -- sole proprietor, different aspects of --  
17 of a business.

18 DEPUTY COMMISSIONER SMITH: Okay. Yeah.  
19 As I said I hadn't seen that before. It sounds  
20 like, it was a potentially very valuable program.

21 INMATE HERNANDEZ: Oh, it is. Yes.

22 DEPUTY COMMISSIONER SMITH: You received  
23 ten Certificates of Achievement, Achievement for  
24 completion of FEMA (inaudible) courses.

---

25 INMATE HERNANDEZ: Uh-huh.

26 DEPUTY COMMISSIONER SMITH: They were all  
27 issued the same month.

1 INMATE HERNANDEZ: Yes.

2 DEPUTY COMMISSIONER SMITH: They were all  
3 issued July of 2005. Did you take them all  
4 during that month?

5 INMATE HERNANDEZ: No. What happened is  
6 that when, when I chose a course and then I have  
7 to wait for a book and then I sent them all at  
8 one time.

9 DEPUTY COMMISSIONER SMITH: Okay.

10 INMATE HERNANDEZ: And that's how it came  
11 in order to (inaudible) that. Because everything  
12 would have to stop on each one. So I was, I was  
13 keeping them all in --

14 DEPUTY COMMISSIONER SMITH: All at once?

15 INMATE HERNANDEZ: -- and then, then I  
16 sent them all at once.

17 DEPUTY COMMISSIONER SMITH: Okay. I knew  
18 there had to be a good reason. Because you got  
19 ten of them in this, all issued the, the same  
20 month same year. The -- the various programs  
21 were entitled Decision Making, Managing  
22 Volunteers, Leadership, Emergency Planning, State  
23 Disaster Management, Orientation to Disaster  
24 Exercises, Livestock and Disaster, Building for  
25 the Earthquakes of Tomorrow, Introduction Into  
26 Hazardous Materials and Functions of an Interview  
27 Program Manager.

1 INMATE HERNANDEZ: Yes, sir.

2 DEPUTY COMMISSIONER SMITH: You also  
3 participated in the Veterans' Self-help group  
4 from August 2004 to February 2005 and your BRAG  
5 Membership application was approved in April of  
6 2005. BRAG stands for Balance Re-entry Activity  
7 Group.

8 INMATE HERNANDEZ: Yes, sir.

9 DEPUTY COMMISSIONER SMITH: Is that an  
10 ongoing group?

11 INMATE HERNANDEZ: Yes.

12 DEPUTY COMMISSIONER SMITH: Okay. So  
13 you're still participating in that group?

14 INMATE HERNANDEZ: We have, right now  
15 because of staff shortages we're having a monthly  
16 meeting. If it wasn't for staff shortage, we  
17 would have at least bi-weekly meetings.

18 DEPUTY COMMISSIONER SMITH: Describe the  
19 program to us.

20 INMATE HERNANDEZ: The, the program is  
21 to, to help inmates coming into prison to get  
22 them adjusted into the different aspects of  
23 parole. To prepare them in education.  
24 Vocational wise through in self-study or through,  
25 through correspondence. Give them peer group  
26 help in the prison. Let them know that, that  
27 even though you're in prison you can help

1     yourself do whatever you, whenever your release  
2     comes and we have a lot of, lot of inmates that  
3     parole everyday and those are the ones that we,  
4     we usually get a hold of so we can be able to  
5     (inaudible). If we can help with our, with our  
6     own experience of being in prison and how in, in  
7     my, my case when I came to prison the, there was  
8     no inmate peer trying to help you to better  
9     yourself to be able to get out and I felt that  
10    the whole story here is of me in prison, had I  
11    known about the, that there were any programs  
12    like this and then they were going to help me out  
13    in understanding way back when I first came to  
14    prison instead of letting go two and three years  
15    by without doing it.

16           DEPUTY COMMISSIONER SMITH: Now, you, in  
17    reading a little bit about it you, you had to  
18    prepare an application and submit it for approval  
19    and acceptance?

20           INMATE HERNANDEZ: Yes, sir.

21           DEPUTY COMMISSIONER SMITH: Is that  
22    right?

23           INMATE HERNANDEZ: That's true.

24           DEPUTY COMMISSIONER SMITH: Sounds like

---

25    it's --

26           INMATE HERNANDEZ: Only --

27           DEPUTY COMMISSIONER SMITH: -- it's not

1 an easy -- an easy program to become a part of;  
2 is that correct?

3 INMATE HERNANDEZ: (inaudible). You have  
4 to do it a team. You get a team to yourself and  
5 that's at least two persons vouching for your,  
6 you can't have no 115, no disciplinary. You have  
7 to have a good work record. You have to be sort  
8 of like an outstand still in prison.

9 DEPUTY COMMISSIONER SMITH: And you're on  
10 a number of waiting lists for a period of time.  
11 Are you still on waiting lists?

12 INMATE HERNANDEZ: Yes, sir.

13 DEPUTY COMMISSIONER SMITH: What -- what  
14 waiting lists are you on?

15 INMATE HERNANDEZ: Two. I got on one of  
16 the, it's a (inaudible) program that, that's  
17 known nationally. It's called Alternative  
18 Survivors and I'm on that waiting list and also  
19 on the Alcoholics Anonymous:

20 DEPUTY COMMISSIONER SMITH: Okay. So  
21 you're on those. Okay. Is it Narcotics  
22 Anonymous or Alcoholics Anonymous?

23 INMATE HERNANDEZ: Alcoholic Anonymous.

24 DEPUTY COMMISSIONER SMITH: Okay. And

---

25 how long have you been on, on that waiting list?

26 I would guess probably at least a year?

27 INMATE HERNANDEZ: Something like that.

1 Yeah. Because I'll be continuing (inaudible) yet  
2 and sometime like when we're locked down that  
3 would be like (inaudible) past three weeks some  
4 of the sponsors they sort of like lose interest  
5 and then we have to find another sponsor to be  
6 able to, to, to sponsor the (inaudible).

7 DEPUTY COMMISSIONER SMITH: You were  
8 assigned as a culinary clerk until July 2005 and  
9 then assigned to the receiving and release clerk.  
10 Are you still in that assignment?

11 INMATE HERNANDEZ: No, sir. I'm back in  
12 the culinary.

13 DEPUTY COMMISSIONER SMITH: When -- when  
14 did you go back in culinary?

15 INMATE HERNANDEZ: Six months ago.

16 DEPUTY COMMISSIONER SMITH: About the  
17 first of the year then?

18 INMATE HERNANDEZ: (inaudible).

19 DEPUTY COMMISSIONER SMITH: Okay.

20 INMATE HERNANDEZ: (inaudible).

21 DEPUTY COMMISSIONER SMITH: And doing  
22 clerk functions there in the culinary?

23 INMATE HERNANDEZ: Yes, sir. The same,  
24 the same job I did.

---

25 DEPUTY COMMISSIONER SMITH: You had a  
26 psychological evaluation. It's somewhat dated,  
27 it's July 23 of 2004 prepared by Dr. Hewchuk, H-

1 E-W-C-H-U-K. Before I go to that evaluation, are  
2 there any other activities that you've been  
3 involved in in the institution since your last  
4 hearing that I haven't addressed that we should  
5 be aware of?

6 INMATE HERNANDEZ: Yes. I'm taking now a  
7 business course through the Education Department.  
8 I have my, my credits. I've -- I signed up  
9 (inaudible) and now I'm doing Business Principles  
10 and Management. And I'm going on unit three,  
11 with an overall course average of 93.

12 DEPUTY COMMISSIONER SMITH: Good. And  
13 that's through the --

14 INMATE HERNANDEZ: The Educational --

15 DEPUTY COMMISSIONER SMITH: -- the  
16 Education Department?

17 INMATE HERNANDEZ: Yes.

18 DEPUTY COMMISSIONER SMITH: Okay. And  
19 when did you start that?

20 INMATE HERNANDEZ: In, I started that on,  
21 on 11/17/2005.

22 DEPUTY COMMISSIONER SMITH: Okay. Thank  
23 you. Anything else?

24 INMATE HERNANDEZ: No.

---

25 DEPUTY COMMISSIONER SMITH: Okay.  
26 Because the, the psychological evaluation is  
27 somewhat dated and wouldn't have been used

1 (inaudible) from an assumption that it would have  
2 been used at your last hearing I'm going to  
3 identify only a couple of sections in what's a  
4 fairly brief evaluation to begin with. And then  
5 if there are any comments or any parts of the  
6 evaluation that you or Ms. Rutledge would like  
7 to, to add for the record I'll certainly give you  
8 that opportunity.

9 INMATE HERNANDEZ: Yes, sir.

10 DEPUTY COMMISSIONER SMITH: Running  
11 through the, the first page the, the doctor  
12 discusses basically your 115's. And it talks  
13 about the, the issue of alcohol abuse and, and  
14 that's been, I'm not going to go into detail  
15 there because we, we've addressed that with you  
16 being on the waiting list for Alcoholics.  
17 Anonymous. But the doctor does write,

18 "That during your incarceration you've  
19 completed Vocational Programming and  
20 Television Production, Data Processing  
21 and Basic Electronics."

22 Is that --

23 INMATE HERNANDEZ: Yes, sir.

24 DEPUTY COMMISSIONER SMITH: That is  
25 accurate?

26 INMATE HERNANDEZ: Yes, sir.

27 DEPUTY COMMISSIONER SMITH: Okay.

1 And that the doctor concludes that,

2 "Currently you are a suitable  
3 candidate for parole with these  
4 consideration with the recidivism  
5 and risk factor no greater than  
6 that of the average citizen in  
7 community."

8 He goes on to note that,

9 "Due to your marketable skills and close  
10 family support it's expected that your  
11 transition to freedom and personal  
12 responsibility would be relatively  
13 smooth."

14 **INMATE HERNANDEZ:** Yes.

15 **DEPUTY COMMISSIONER SMITH:** Any comments  
16 or any other sections of that evaluation that you  
17 or Ms. Rutledge would like to address for the  
18 record?

19 **ATTORNEY RUTLEDGE:** I would. Yes. On  
20 page 1, third paragraph, it says his last violent  
21 based 115 occurred in 1998. Although Dr. Turedey  
22 (phonetic) in his previous report assessed inmate  
23 Hernandez,

24 "As low risk in a community setting.

---

25 The Board expressed some concern  
26 about a pattern of, of poor violence  
27 based 115 during the 27-year period

1 of incarceration. A review of the  
2 actual 115 document is in the C-File  
3 and subsequent discussion with  
4 inmate Hernandez confirmed that each  
5 instance inmate Hernandez was the  
6 victim of an assault (inaudible) by  
7 another inmate reacted by defending  
8 himself. The recent CC policy  
9 classifying a majority of fights  
10 between inmates and mutual combat  
11 searched with further (inaudible).  
12 Actual issues of fact -- and he  
13 would -- part of it due to his  
14 remarkable skills in (inaudible)  
15 family support it is expected that  
16 his transition and freedom and  
17 personal responsibility would be  
18 (inaudible) tight."

19 Thank you.

20 DEPUTY COMMISSIONER SMITH: Anything  
21 else?

22 ATTORNEY RUTLEDGE: No, sir.

23 DEPUTY COMMISSIONER SMITH: Okay. Thank  
24 you. We're going to refer back again to the, the  
25 04 Board Report. Since the current Board Reports  
26 I believe referred this all back to that one.  
27 Under parole plans it indicates that you'd, you

1 plan on residing with your brother and sister-in-  
2 law who at that time lived in Pacoima.

3 INMATE HERNANDEZ: Yes, sir.

4 DEPUTY COMMISSIONER SMITH: We have a  
5 letter, which I'll address from your brother and  
6 sister-in-law shortly, but they now live Sylmar.

7 INMATE HERNANDEZ: Yes, sir.

8 DEPUTY COMMISSIONER SMITH: And then  
9 under employment indicates that you're confident  
10 that you can employ, that you can get employment  
11 with a Marco Sanchez who's a cousin?

12 INMATE HERNANDEZ: Yes.

13 DEPUTY COMMISSIONER SMITH: Who owns a  
14 body and fender mechanic shop in Rosemead and in  
15 the San Fernando Valley. This -- he owns two  
16 businesses?

17 INMATE HERNANDEZ: Yes. He, he owns --

18 DEPUTY COMMISSIONER SMITH: And that you  
19 would be employed by him to -- doing clerical  
20 duties.

21 INMATE HERNANDEZ: Yes.

22 DEPUTY COMMISSIONER SMITH: And the  
23 letter that, that we have, as I indicated is from  
24 your brother and sister-in-law. It stated that

---

25 December 26, 2005, indicates that writing on your  
26 behalf they would welcome you into their home in  
27 Sylmar. And that, you know, they're well

1 established people because they're both employed.

2 Do you know what kind of a residence they  
3 have in Sylmar?

4 INMATE HERNANDEZ: Yeah. It's, and it's  
5 not, not considered a house and it's sort of  
6 like, I don't know how you would say, duplex I  
7 believe or something like that.

8 DEPUTY COMMISSIONER SMITH: Like a duplex  
9 or a townhouse?

10 INMATE HERNANDEZ: Something like that.

11 DEPUTY COMMISSIONER SMITH: Something  
12 like that? Something larger than an apartment?

13 INMATE HERNANDEZ: Yes. Something like,  
14 yes.

15 DEPUTY COMMISSIONER SMITH: Do you know  
16 how many bedrooms it has?

17 INMATE HERNANDEZ: I think they have two.  
18 I don't honestly --

19 DEPUTY COMMISSIONER SMITH: The, the  
20 reason I'm asking is that in, in the letter it  
21 indicates that beside your brother and his wife  
22 they also have three children.

23 INMATE HERNANDEZ: Yeah.

24 DEPUTY COMMISSIONER SMITH: So if you  
25 were residing there where would you, where would  
26 you sleep?

27 INMATE HERNANDEZ: Yeah. Good question.

1 DEPUTY COMMISSIONER SMITH: It's -- you  
2 know, I'm not discounting the, the value of the  
3 letter in terms of --

4 INMATE HERNANDEZ: I understand.

5 DEPUTY COMMISSIONER SMITH: -- your  
6 brother would like to offer you a residence.

7 INMATE HERNANDEZ: (inaudible). No. I'm  
8 just (inaudible) --

9 DEPUTY COMMISSIONER SMITH: But I'm, but,  
10 but I'm wondering just how --

11 INMATE HERNANDEZ: Exactly.

12 DEPUTY COMMISSIONER SMITH: -- realistic  
13 there is in the fact that such a five-person  
14 family already --

15 INMATE HERNANDEZ: Uh-huh.

16 DEPUTY COMMISSIONER SMITH: The other  
17 question I have is that if you were going to, and  
18 I'm not familiar with that, with that area  
19 geographically. If you were going to be  
20 residing, for the sake of conversation, in the  
21 Sylmar area --

22 INMATE HERNANDEZ: Yeah.

23 DEPUTY COMMISSIONER SMITH: -- how far is  
24 that from Rosemead or San Fernando Valley?

---

25 INMATE HERNANDEZ: To Rosemead, I'd said  
26 a good drive.

27 DEPUTY COMMISSIONER SMITH: (inaudible).

1 Sometimes a good drive is on a sunny Sunday  
2 afternoon and --

3 INMATE HERNANDEZ: Yeah.

4 DEPUTY COMMISSIONER SMITH: -- sometimes  
5 it's in commute driving?

6 INMATE HERNANDEZ: Yeah. This, it, it is  
7 a long commute. It's going to be a long commute  
8 for the I believe, you know, first four weeks  
9 till I get established. And then I -- I have a  
10 plan also to be able to apply under the Veterans'  
11 Assets, which it's going to help me under, for to  
12 be able to find a larger place, you know,  
13 hopefully, you know, I can use my GI Bill to be  
14 able to get a down payment for a home being that  
15 my brother's working, and he's also a Veteran,  
16 and so these are, these are the things that I  
17 have sort of looked at and be able to make it.

18 DEPUTY COMMISSIONER SMITH: And have you  
19 contacted the VA regarding those benefits would  
20 be available to you?

21 INMATE HERNANDEZ: I have. Yes, I have.

22 DEPUTY COMMISSIONER SMITH: Okay.

23 INMATE HERNANDEZ: I have letters from  
24 them and I have all of the, they sent me a, a  
25 whole packet of the (inaudible).

26 DEPUTY COMMISSIONER SMITH: So what's  
27 the, what's the most recent letter? Because

1 those are letters that, that this Panel, as past  
2 Panels, you know, should be aware of.

3 INMATE HERNANDEZ: And I, and I didn't  
4 bring the copy of that letter. But I'll, I'll be  
5 glad to, I, I can show you the latest one that I  
6 have. I think it's, it's about a year old that,  
7 that was on - I don't want to take much of your  
8 time.

9 DEPUTY COMMISSIONER SMITH: No. We,  
10 this, this is an extremely important hearing.  
11 You have all the, all the time that you need.

12 INMATE HERNANDEZ: I don't have it, but I  
13 can get in touch with them because the GI Bill I  
14 think, I understand it to be, has changed since I  
15 think after I think '82. And in the time that,  
16 that I served was during the Viet Nam era time,  
17 which means that all my benefits are different  
18 than the benefits that are now given. And in,  
19 and in mine a lot of them are still there. The  
20 only, the only one that expired during my  
21 incarceration was the education benefit that I  
22 had. That only lasted ten years and, and I'm  
23 assuming that expired. But that's the only  
24 benefit that's, that, that has expired since I've  
25 been in prison. The home loan, the 1980 I  
26 believe, 1986 Veterans' Benefit Bill that passed  
27 by President, I believe it was, I forget the

1 President, but I recall --

2 DEPUTY COMMISSIONER SMITH: (inaudible).

3 INMATE HERNANDEZ: -- that it was, it  
4 was, this was to help the Veterans that were  
5 homeless and the persons that were, that were  
6 also coming out of prison or that needed help in  
7 adjustment that that was also going to be  
8 beneficial to us.

9 DEPUTY COMMISSIONER SMITH: Some --  
10 something that, that I'm curious about, you know,  
11 the, you know this is your 13<sup>th</sup> subsequent  
12 hearing.

13 INMATE HERNANDEZ: Seventeen.

14 DEPUTY COMMISSIONER SMITH: No. We had  
15 your 12<sup>th</sup> was in '05. So this, this is your 13<sup>th</sup>  
16 subsequent hearing. So you had one initial,  
17 which was 14 and you probably had a couple of  
18 document, documentation hearings prior to that.

19 INMATE HERNANDEZ: Well, when I came in  
20 at the time I never had a document, I had one  
21 documentation in '80, in '80 --

22 DEPUTY COMMISSIONER SMITH: Well, my  
23 point is that, that I'm sure at least, if not in  
24 every one of those instances the, in the majority  
25 of those instances you would have been counseled  
26 on how important it is to have letters of support  
27 for residence, employment, from family and

1 friends and so forth.

2 INMATE HERNANDEZ: Yes.

3 DEPUTY COMMISSIONER SMITH: And you have,  
4 you know, a very positive letter from your  
5 brother.

6 INMATE HERNANDEZ: Yes.

7 DEPUTY COMMISSIONER SMITH: You know,  
8 certainly some, some questions with regard to the  
9 viability of the residential plan that we've  
10 already addressed. But there's no employment  
11 letters.

12 INMATE HERNANDEZ: Yes.

13 DEPUTY COMMISSIONER SMITH: And, and I'm  
14 wondering why.

15 INMATE HERNANDEZ: Prior to '88 I used to  
16 always get letters, a lot of letters, a lot of  
17 jobs, opportunity. I was found suitable in 1988  
18 and then on review it was --

19 DEPUTY COMMISSIONER SMITH: Yeah. But,  
20 but we're talking now. We're talking now 2006.

21 INMATE HERNANDEZ: Well I'm getting, I'm  
22 getting there.

23 DEPUTY COMMISSIONER SMITH: Okay. Well I  
24 don't want to roll the clock back for 20 years.

---

25 INMATE HERNANDEZ: Okay.

26 DEPUTY COMMISSIONER SMITH: But I want to  
27 talk about right now, because it, because it's

1 right now that's critical to you.

2 INMATE HERNANDEZ: Exactly. I understand  
3 that. And my reason was that every year that I  
4 come to this hearing my family, the person that I  
5 love, used to get their hopes up high, real high.  
6 And being that in 1990 I received a, I was  
7 (inaudible) received a, a release date and I held  
8 that for two years. They had me coming home  
9 already and then, you know, the extension period  
10 and it was taken away and ever since then I kind  
11 of like that, that I wasn't going to put them  
12 through this again. My grandmother died during  
13 (inaudible) time and, you know, I, I (inaudible),  
14 you know why should I be bothering them people  
15 out there if I'm not never going to get out.

16 DEPUTY COMMISSIONER SMITH: Well, I -- I  
17 understand your, your point of courtesy and  
18 certainly we're a long way from making a decision  
19 about whether or not we're going to find you  
20 eligible today.

21 INMATE HERNANDEZ: Right.

22 DEPUTY COMMISSIONER SMITH: But you need  
23 to understand that if, if you don't have all the  
24 I's dotted and all the, the T's crossed that to  
25 an extent you may be handcuffing the Board. And  
26 again, you know, because of, of the number of  
27 hearings you've had and, you know, other past

1 letters, you know, we'll certainly discuss those  
2 at the recess, so I'm not suggesting that, you  
3 know, we're not, not going to grant at this  
4 point, because again I, I have no idea. But you  
5 need to understand at the very least that by not  
6 establishing parole plans, your residence and  
7 employment and getting the kinds of letters that  
8 may get other people's hopes up that you tend to  
9 handcuff the Panels. And you're not doing  
10 yourself the service; you're doing yourself a  
11 disfavor. You need to understand that. I'm sure  
12 you've heard that before.

13 INMATE HERNANDEZ: Yes, I have.

14 DEPUTY COMMISSIONER SMITH: But some,  
15 some things bear repeating.

16 INMATE HERNANDEZ: Yes, sir. I, I  
17 appreciate it.

18 PRESIDING COMMISSIONER DAVIS: We'll take  
19 a short recess.

20 DEPUTY COMMISSIONER SMITH: Yes.

21 R E C E S S

22 DEPUTY COMMISSIONER SMITH: And the  
23 previously identified is back in the hearing  
24 room.

---

25 PRESIDING COMMISSIONER DAVIS: All right.  
26 I appreciate everyone's indulgence. It was  
27 getting a little stuffy in here for me. So I've

1 also given everyone permission to shed their  
2 coats if that's all right with you Mr. Hernandez.

3 INMATE HERNANDEZ: Oh, yes.

4 PRESIDING COMMISSIONER DAVIS: We don't  
5 want to seem to informal to you, but --

6 INMATE HERNANDEZ: Sure.

7 PRESIDING COMMISSIONER DAVIS: -- it, it  
8 sure does get very stuff very quickly, so -- All  
9 right. With that we'll resume where we left off.

10 DEPUTY COMMISSIONER SMITH: So we also,  
11 also sent out what are known as 3042 notices.  
12 Those are letters that go out to the various  
13 Criminal Justice Agencies that were involved in  
14 your commitment offense. We didn't receive any  
15 responses back to those notices, although you do  
16 have Mr. Turley here representing the Los Angeles  
17 County District Attorney's Office and he'll be  
18 participating in the hearing in just a few  
19 moments. Before I return to Commissioner Davis  
20 is there any, any comments that you'd like to  
21 make with regard to your parole plans that I  
22 haven't addressed?

23 INMATE HERNANDEZ: No.

24 DEPUTY COMMISSIONER SMITH: Okay. Thank  
25 you.

26 INMATE HERNANDEZ: (inaudible).

27 DEPUTY COMMISSIONER SMITH: Commissioner.

1           PRESIDING COMMISSIONER DAVIS: Tell me  
2 about your participation in AA. How, what, what  
3 kinds of things have you found (inaudible) in  
4 there?

5           INMATE HERNANDEZ: AA means, it's a grave  
6 tool for a person that's in need of, of help  
7 dealing with alcoholism. It made me realize that  
8 I can enjoy some activities without, without  
9 drinking alcohol. It made me realize that I  
10 missed a lot of special events by drinking  
11 alcohol. I can remember in one day that my  
12 sister brought pictures of the wedding. I could  
13 never, I couldn't remember the wedding. I  
14 couldn't remember the members that participated  
15 in the wedding. And because I was always  
16 drinking. And it made me realize that it's also  
17 detrimental to your health. Especially as you  
18 get older. It does a lot of damage to your  
19 liver.

20           PRESIDING COMMISSIONER DAVIS: You  
21 consider yourself to be an alcoholic?

22           INMATE HERNANDEZ: Yes, sir.

23           PRESIDING COMMISSIONER DAVIS: Is that a  
24 life-long issue for you?

---

25           INMATE HERNANDEZ: Yes, it is going to be  
26 a life long issue.

27           PRESIDING COMMISSIONER DAVIS: What

1 things have you had to plan for your ultimate  
2 release in terms of identifying AA programs on  
3 the outside?

4 INMATE HERNANDEZ: I know that in  
5 anywhere, in any city, I can dial 1-800-AA and  
6 I'll get a, a sponsor on the line that's going to  
7 help me. There are thousands and thousands of  
8 organizations dealing with Alcohol Anonymous.  
9 Not only for the alcoholic, but also for the  
10 family members, because they too I believe suffer  
11 and --

12 PRESIDING COMMISSIONER DAVIS: All right.  
13 Commissioner, any questions that you might have?

14 DEPUTY COMMISSIONER SMITH: No.

15 PRESIDING COMMISSIONER DAVIS: Mr.  
16 Turley, questions?

17 DEPUTY DISTRICT ATTORNEY TURLEY: Just a  
18 couple. I kind of missed something. What  
19 periods was, was the inmate actively  
20 participating in AA?

21 PRESIDING COMMISSIONER DAVIS: Do you know  
22 when you were participating in AA what years?

23 INMATE HERNANDEZ: I believe it's going  
24 on two years right now on, on the waiting list.

---

25 PRESIDING COMMISSIONER DAVIS: Well two  
26 years on the waiting list, but prior to that what  
27 was your, were you actively participating in AA

1 prior to that?

2 INMATE HERNANDEZ: Not AA, but there was  
3 a, a span of time that I had stopped  
4 participating for what, (inaudible) AA. That  
5 being the last, the last chrono that I have there  
6 is from, should be on, on my, on my file. Right  
7 before, before I got here in '89. No. '98. You  
8 have on your list '98?

9 PRESIDING COMMISSIONER DAVIS: You got  
10 here in '98.

11 INMATE HERNANDEZ: When I got here.  
12 Thank you.

13 DEPUTY DISTRICT ATTORNEY TURLEY: And how  
14 long have you participated in AA?

15 PRESIDING COMMISSIONER DAVIS: In total  
16 how long have you participated in AA?

17 INMATE HERNANDEZ: Oh. Since '79.

18 PRESIDING COMMISSIONER DAVIS: Okay.

19 DEPUTY DISTRICT ATTORNEY TURLEY: When  
20 was it that the inmate first admitted to his  
21 guilt in this offense to the authorities?

22 PRESIDING COMMISSIONER DAVIS: Do you  
23 understand the question?

24 INMATE HERNANDEZ: Yes.

---

25 PRESIDING COMMISSIONER DAVIS: Okay.

26 INMATE HERNANDEZ: I admitted to this  
27 crime during a session that my (inaudible) that

1 that I mastered the therapy that they had me do.  
2 During that group, so possibly five or six  
3 persons that have to talk about the crime and  
4 have to admit that you commit the crime. And  
5 that was, I was, I was believe number four or  
6 five and as I heard each person I felt a lot of  
7 guilt and that was the first time that I, that I  
8 voiced (inaudible) as it happened and, and  
9 admitted to, admitted to, to committing this,  
10 this offense.

11 PRESIDING COMMISSIONER DAVIS: And what  
12 year was that?

13 INMATE HERNANDEZ: I think it was '88.  
14 Or '87.

15 DEPUTY DISTRICT ATTORNEY TURLEY: No  
16 further questions.

17 PRESIDING COMMISSIONER DAVIS: All right.  
18 Ms. Rutledge?

19 ATTORNEY RUTLEDGE: Just a question too.  
20 I wanted to just review some of the skills that  
21 you've learned since you've been in prison. You  
22 worked as a clerk?

23 INMATE HERNANDEZ: Yes.

24 ATTORNEY RUTLEDGE: How many years did  
25 you put in as a clerk all together, do you think,  
26 in prison?

27 INMATE HERNANDEZ: This time (inaudible)

1 say roughly '79 and I've done nothing but  
2 clerical except for some time that I spent doing  
3 vocational courses. I've always -- I always have  
4 classes.

5 ATTORNEY RUTLEDGE: Did you complete  
6 (inaudible)?

7 INMATE HERNANDEZ: Yeah. Data  
8 Processing.

9 ATTORNEY RUTLEDGE: Did that help your  
10 typing or what did you learn in the Data  
11 Processing?

12 INMATE HERNANDEZ: It showed me to  
13 manipulate difference softwares. It showed me a  
14 different aspect of computer hardware and how to  
15 maintain records, things that are needed in the  
16 clerical environment.

17 ATTORNEY RUTLEDGE: All right. And you,  
18 what other jobs have you held at the prison that  
19 taught you skills that would, you could use to be  
20 employed on the outside?

21 INMATE HERNANDEZ: Oh I think I've been  
22 a -- I've been a -- I'm trying to remember the --  
23 the title.

24 ATTORNEY RUTLEDGE: Okay. (inaudible).

25 INMATE HERNANDEZ: I did all the, I typed  
26 all of the, the, the invoices for purchasing. I  
27 was a purchasing clerk at the hospital, T and C.

1 I dealt with the purchasing orders and then  
2 receiving and then we used clerical dealing with  
3 different aspects of, of maintaining the, the  
4 supplies. (inaudible) the culinary, on the  
5 culinary (inaudible). And I, I maintained a  
6 database on all the culinary workers. I did the  
7 payroll. I, I prepared the lists for the  
8 (inaudible) so they can come to work. It's been,  
9 then I worked as at different job positions.

10 ATTORNEY RUTLEDGE: All right. Any other  
11 skill? You were loading docks before you  
12 (inaudible) at that?

13 INMATE HERNANDEZ: Yes.

14 ATTORNEY RUTLEDGE: And you got your --  
15 your speech thing for an auto accident?

16 INMATE HERNANDEZ: Yes, ma'am.

17 ATTORNEY RUTLEDGE: All right. No  
18 further questions.

19 PRESIDING COMMISSIONER DAVIS: All right.  
20 Thank you. Mr. Turley, (inaudible).

21 DEPUTY DISTRICT ATTORNEY TURLEY: Thank  
22 you. The, very long-standing conventional list  
23 in, you know, things you just said. Perhaps the  
24 very best school to teach maturity and

---

25 responsibility is military service. And this  
26 inmate had the benefit of that school for about  
27 three and a half years. And apparently he was a

1 poor student. Almost immediately after getting  
2 out of the army rather than having learned  
3 responsibility, rather than learn the, the  
4 lessons of growing up, take control of himself,  
5 keeping his nose clean and holding a good job he  
6 seemed to learn irresponsibility and the only  
7 meaningful experience that based on what we've  
8 heard today evolved from the army was that he  
9 came out of the army with a substantial amount of  
10 experience in how to handle a handgun. The  
11 particular, the underlying offense here was  
12 again, part of, of a pattern of, of the events  
13 that were criminal tied to alcohol. He was out  
14 of the army a very short time, stole a taxicab  
15 and then in less than a year after he got out of  
16 the army he committed this offense. By his own  
17 admission fails to discuss what he believes was a  
18 burglary with the police and decides to take  
19 things into his own hand. He was confronted by a  
20 person, makes him angry, he's got a few beers  
21 under his belt, he goes off, gets a gun, comes  
22 back and without seeing (inaudible) over anything  
23 else shoots another person right through the  
24 heart. Killed him dead. Chases two others and  
25 shoots at them. Then for an additional period,  
26 approximately eleven years of so by this  
27 statement, eleven or twelve years, he still

1 refuses even to admit to the authorities his own  
2 guilt in the matter. And that's, it's  
3 commendable that he finally got around to that,  
4 but this is a very serious crime, took a person's  
5 life, didn't seem to give it any, any thought at  
6 all. Walked up to a person virtually at point  
7 blank range and shoots him through the heart and  
8 (inaudible) to that offense alone is the  
9 appropriate for denial of parole. At the time  
10 that he committed this offense, again he was 23  
11 years old. He'd had substantial experience with  
12 law enforcement agencies due to his own  
13 activities. Highly improbable that he didn't  
14 recognize that it was unlawful for him to even be  
15 in possession of the firearm. And he -- he made  
16 a concerted effort went, went right to the heart  
17 of the matter indications criminal behavior. I  
18 think that for all these reasons, but primarily  
19 focusing on the, on his failure to, to learn the  
20 lessons of life at an age when he should have  
21 been completely mature he engaged in this, this  
22 offense for a very trivial reason showing no  
23 regard to human life and killed another person  
24 in, (inaudible) a sheer act of callous disregard  
25 for human life. And the people would recommend  
26 that parole be denied at this time. Thank you  
27 very much.

1           PRESIDING COMMISSIONER DAVIS: Thank you.  
2 Thank you. Ms. Rutledge?

3           ATTORNEY RUTLEDGE: Thank you. Mr.  
4 Hernandez is 52 years old; is that correct?

5           INMATE HERNANDEZ: Fifty-one.

6           ATTORNEY RUTLEDGE: Fifty-one. He's 51  
7 years old. At the time this commitment offense,  
8 which was 29 years ago, is that right? The  
9 offense in itself --

10          INMATE HERNANDEZ: Yes, ma'am.  
11 (inaudible).

12          ATTORNEY RUTLEDGE: -- was in 1977. He  
13 was 23? Twenty-four, twenty-three?

14          INMATE HERNANDEZ: Yes.

15          ATTORNEY RUTLEDGE: Twenty-three years  
16 old. A lot of time, I mean this is a crime  
17 that's nearly 30 years old. So as far as, as,  
18 him serving his time it's definitely met. He, in  
19 those 30 years he had four 115's? Yeah. I think  
20 it's four. I'm just going to look refer to that.  
21 And --

22          DEPUTY COMMISSIONER SMITH: That's  
23 correct, Counselor. It's four.

24          ATTORNEY RUTLEDGE: It's four. And they  
25 were all; they all had big spans I want to note.  
26 There were seven years from '83 to '90. Four  
27 years. Got another one in '94. Four more years.

1 So it, it wasn't like he was, you know, racking  
2 them up one a year or one every other year.  
3 There was just a significant amount of time that  
4 transpired between each one. And the last one  
5 being more than eight years ago. And I think  
6 that, and prior to him coming here he didn't  
7 really have a consistent record of any kind of  
8 violence. It sounds to me like when he went to  
9 the military he learned how to shoot guns. He  
10 probably wouldn't have felt this confident that  
11 day with a gun. I mean I -- I was amazed to take  
12 a gun that you, and never tried to shoot it  
13 first, you know, unless you've got some kind of  
14 skill in, in that regard. This was a situational  
15 circumstance where he just applied poor judgment  
16 for whatever reason. But that again was almost  
17 30 years ago. Today he's -- he's complied with  
18 everything in the system that he's been asked to  
19 do. In fact, there's an, there's an old Board  
20 Report I'll pull up where it was dated 1987, his  
21 counselor at that time said that he'd been  
22 complying with the Board of Prison, at that time  
23 the Board of Prison Terms and Recommendations, he  
24 remained disciplinary free, he upgraded  
25 vocationally, participated in self-help, there's  
26 lots of Board Reports that indicated a  
27 participation and there was, he did another AB

1 Substance Abuse, and another course. He'd done  
2 countless self-help groups. More recently some  
3 prison fellowship work in fact a few years ago.  
4 He has college courses. He completed his  
5 (inaudible). Lots of (inaudible) chronos for his  
6 different jobs he's had throughout the years and  
7 I want to, I think the, the two main things  
8 about, about him today are one, he meets the  
9 suitability factors completely. He's got  
10 marketable skills, he has a place to live with  
11 family members who know him in LA County upon his  
12 release. Second, he's been found suitable twice.  
13 Two different Boards, two years apart, found Mr.  
14 Hernandez suitable and other Boards too have  
15 referred him to, you know, I guess to (inaudible)  
16 commitment offense to, sent him back for psyches  
17 and he did fine. He did fine in the Cat X  
18 program. Going back to '87 he got a great psych  
19 report.

20 "The probability of him committing a  
21 violent act is considerably reduced  
22 from what it was at the time of his  
23 arrest and there was a high  
24 probability that he could complete a  
25 course of parole without incident.  
26 He has the capacity to make a good  
27 occupational and social adjustment

1 on release."

2 That's '87. And then moving up to '99  
3 he, he, on, on the diagnostic impressions he had  
4 no personality disorder. He had a gap of '90.  
5 His prognosis is very positive for being able to  
6 maintain his current mental (inaudible) in the  
7 community upon parole. And then review of the  
8 life crime is that he understood several of the  
9 key factors, which favorable of the crime. He  
10 acknowledged that he deserves whatever punishment  
11 will come to him for his actions. He stated it  
12 was never his intention to kill anyone. I  
13 believe this inmate showed above average  
14 understanding that why this crime occurred and  
15 the appropriate and genuine amount of remorse.  
16 And then, then up to a recent psyche report,  
17 which you reviewed. So over decades he'd gotten  
18 good psyche reports. Again he's been found  
19 suitable twice and he's complied with everything,  
20 as far as suitability factors goes. He meets all  
21 of them. And he has, again, nearly 29 years in.  
22 So all of those things considered, I would ask  
23 the Board to give him a parole date today. And,  
24 and I would note too that because he's been found  
25 suitable twice I would also ask the Board to set  
26 a term. Because I believe that the, the, under  
27 the law that he was sentenced under when he's

1 found suitable a term is supposed to be set.

2 PRESIDING COMMISSIONER DAVIS: Okay.

3 Thank you. Mr. Hernandez, now it's your  
4 opportunity to address the Panel directly and  
5 tell us why you believe that you are suitable for  
6 parole.

7 INMATE HERNANDEZ: Yes' sir. My thoughts  
8 right now are running past me right now, but I  
9 have to say that I don't blame nobody for  
10 committing this crime, because I, I'm very sorry  
11 for it. And I was (inaudible) it's been this  
12 long. I feel, and I beg for, another chance just  
13 to, to live this remaining years that I probably  
14 have with my family. And I wish then that, that  
15 I probably have no right to, to ask for this.  
16 And, and I know that this time that I've done  
17 here is not going to be compared to, to finally  
18 when I reach the judgment when I (inaudible). So  
19 that's --

20 PRESIDING COMMISSIONER DAVIS: All right.  
21 Thank you very much, sir.

22 DEPUTY COMMISSIONER SMITH: Thank you.

23 PRESIDING COMMISSIONER DAVIS: We'll now  
24 recess for deliberation.

---

25 R E C E S S

26 --oOo--

27

## 1 CALIFORNIA BOARD OF PAROLE HEARINGS

## 2 D E C I S I O N

3 DEPUTY COMMISSIONER SMITH: For the  
4 record, everyone previously identified is back in  
5 the hearing room.

6 PRESIDING COMMISSIONER DAVIS: This is the  
7 matter of Peter Hernandez, CDC number C-03015.

8 In a review of all information received from the  
9 public and relied on the following circumstances  
10 in concluding the prisoner is not suitable for  
11 parole, he would pose a reasonable risk of danger  
12 to society or a threat (inaudible) he was in

13 prison we come to this conclusion by the  
14 commitment offense that was committed in a  
15 special callous manner. There were multiple  
16 victims attacked (inaudible) one was killed in  
17 the same incident. The motive for the crime was  
18 very (inaudible) in relation to the offense.

19 These conclusions were drawn from the Statement  
20 of Fact wherein the prisoner as to what he  
21 describes as an attempt to recover stolen  
22 property where he was threatened by what he  
23 describes as an armed person. He sought out a  
24 weapon, put himself back into a dangerous

---

25 situation, confronted the person who may or may  
26 not have been involved in the theft of his

27 P. HERNANDEZ C-03015 DECISION PAGE 1 7/13/06

1 sister's property and without seeing a weapon or  
2 any (inaudible) and threat he used this, he used  
3 his own weapon to shoot and kill the victim then  
4 turned the weapon on to the victims' two  
5 companions shooting at them, striking them in the  
6 leg. We find there is basically a pattern of  
7 criminal conduct and a failure to prophet from  
8 the society previous attempt to correct  
9 criminality specifically adult probation. In  
10 regard to institutional behavior we find that  
11 there are seven 128A counseling chronos, the last  
12 of which was in December of 2000, and four  
13 serious 115 disciplinary (inaudible), the last of  
14 which was in February of 1998. The Psychological  
15 Report of July of 2004 by Dr. (inaudible) is  
16 supportive and the, with regard to parole plans,  
17 we find that the parole plans are not realistic.  
18 There is, there, there is virtually no employment  
19 plan, there's no support of even employment  
20 information by statements that there are some  
21 distance, there's no real plan though. And your  
22 residential plans of sharing a two-bedroom  
23 residence with two adults and three the children  
24 seems suspect. Now I say that understanding that

---

25 if that's the option then what you need to do is  
26 come back in here with an

1 explanation that, yes, we understand it's going  
2 to be tight, we thought about this. We'll put a  
3 cot up in the living, we're going to partition  
4 off, what, whatever it is. If that's the case  
5 then, then let us know that. And that's where  
6 you need to, that's where you need to focus your  
7 work. I understand and appreciate that at some  
8 point in time you became embarrassed or, or you  
9 didn't want to burden your family more with, with  
10 denial after denial. I understand. But the  
11 thing of it is this is a critical part of this  
12 and there's -- you could earn a date, but this  
13 has to be part of your earning that date. So you  
14 need to spend this, this time now in figuring out  
15 your parole plan. Get a job offer. You have  
16 skills, there's no reason why you can't get a job  
17 offer out there, or at least something lined up.  
18 Do some research to determine where you can find  
19 a job given the skills that you have. And let  
20 your family help you.

21 INMATE HERNANDEZ: Okay, sir.

22 PRESIDING COMMISSIONER DAVIS: It's not  
23 that difficult for them to do that. The, with  
24 regard to the 3032 notices. The District

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25 Attorney from Los Angeles County is here in  
26 person by representative because (inaudible)

27 P. HERNANDEZ C-03015 DECISION PAGE 3 7/13/06

1 parole. Nonetheless we want to commend you for  
2 several things. Your 2005 Certificate for your  
3 Entrepreneur of the workshop, your ten FEMA  
4 Certificates including lessons in Leadership and  
5 Planning, your Veterans Support Group of eight,  
6 from eight of 2004 and two of 2005, your two  
7 Health Certificates, Certificates of Achievement,  
8 your work as a culinary clerk and as a receiving  
9 clerk and then back again as a culinary clerk,  
10 your work in the BRAG Group helping the new  
11 inmates requiring an application process and  
12 recommendation. You should be very proud of  
13 that.

14 INMATE HERNANDEZ: Thank you.

15 PRESIDING COMMISSIONER DAVIS: That's a  
16 significant achievement to have to apply for  
17 something, to have to work on, you had to work to  
18 get that, that wasn't just something you could  
19 say yeah, I'll do that. You had to (inaudible)  
20 on a record. Put that same effort into your  
21 parole plans. And we appreciate the fact that  
22 you're on the AA waiting list and that you're on  
23 the waiting list for Alternatives to Violence, as  
24 well as starting a new business course as of

---

25 November of '05.

26 INMATE HERNANDEZ: Yes, sir

27 P. HERNANDEZ C-03015 DECISION PAGE 4 7/13/06

1           PRESIDING COMMISSIONER DAVIS: That's  
2     excellent. This is a one-year denial and the  
3     Panel recommends that you, that you remain  
4     disciplinary free, that as available that you  
5     participate in self-help. You're obviously an  
6     intelligent man, so if you're on a waiting list  
7     for any (inaudible) don't wait forever, get some  
8     books on self-help, read them, keep track of what  
9     you've read, writing a book a report or be  
10    prepared next time you come in to discuss with  
11    the Panel what you've read and how (inaudible)  
12    some insight and how you took the initiative to,  
13    to do that instead of just waiting for the list  
14    to (inaudible). And, and get your parole plans  
15    squared away. And we are going to also request a  
16    new Psychological Evaluation be done.  
17    Commissioner, do you have any other thoughts on  
18    this?

19           DEPUTY COMMISSIONER SMITH: Mr.  
20     Hernandez, we're, you know, not, not to, to beat  
21     you up, because we're not trying to do that.

22           INMATE HERNANDEZ: Yes, sir.

23           DEPUTY COMMISSIONER SMITH: You program  
24     in, in a very, very positive manner. You  
25     certainly have been incarcerated for an extended  
26     period of time. You present yourself very well,  
27     P. HERNANDEZ C-03015 DECISION PAGE 5 7/13/06

1 you're clearly an intelligent man. You developed  
2 a lot of skills that can be applied in a  
3 community. And yet for some reason you simply  
4 opted not to take that, that next necessary step  
5 to establish your parole plans. You know, this,  
6 this (inaudible) denial is as much your decision  
7 as it was ours. You've got to have those parole  
8 plans. You -- you've got to know where you're  
9 going to be living, and it's got to be realistic.

10 INMATE HERNANDEZ: Yes, sir.

11 DEPUTY COMMISSIONER SMITH: You've got to  
12 know where you're going to be working. You know,  
13 if, if you got a job offer and it's specific,  
14 what are you going to be doing, you know, how  
15 much are you going to get paid. If it's some  
16 distance away from where you're going to be  
17 living, how are you going to get to point A to  
18 point to point B and back again. There are a  
19 number of reasons why those are very important.  
20 And one of the reasons is that if, if we were to  
21 grant you a date, or the next Panel grants you a  
22 date, that decision goes in front of the whole  
23 Board --

24 INMATE HERNANDEZ: Yes.

25 DEPUTY COMMISSIONER SMITH: -- and they  
26 vote to either support the granting of the date  
27 P. HERNANDEZ C-03015 DECISION PAGE 6 7/13/06

1 or to send it back. If they vote to grant it  
2 then it goes to the Governor. Okay? So it isn't  
3 just our decision. Well, even if we believe you  
4 can be successful in spite of not having parole  
5 plans, you're coming back because nobody else is  
6 going to believe that. Nobody else has the  
7 opportunity to be able to sit here and talk to  
8 you one-on-one face to face.

9 INMATE HERNANDEZ: Yes, sir.

10 DEPUTY COMMISSIONER SMITH: So, again,  
11 I'm not trying, neither one of us is trying to,  
12 you know, beat you up by telling you the same  
13 thing over and over and over and over again.

14 INMATE HERNANDEZ: Yeah.

15 DEPUTY COMMISSIONER SMITH: But we want  
16 you to hear us.

17 INMATE HERNANDEZ: Okay.

18 DEPUTY COMMISSIONER SMITH: And we want  
19 you to hear us in a positive way. Okay? You got  
20 to deal with the program.

21 INMATE HERNANDEZ: It's a whole lot of  
22 difference, the parole plans. I'll -- I'll make  
23 sure I do very extensive work on that.

24 DEPUTY COMMISSIONER SMITH: Good.

---

25 INMATE HERNANDEZ: And also I have a, you  
26 know, a quarter report, quarterly report on how  
27 P. HERNANDEZ C-03015 DECISION PAGE 7 7/13/06

1 I'm going to live out there (inaudible).

2 DEPUTY COMMISSIONER SMITH: You, you have  
3 about a year to, to do that.

4 INMATE HERNANDEZ: Yes, sir.

5 DEPUTY COMMISSIONER SMITH: You know,  
6 bring in the, the VA --

7 INMATE HERNANDEZ: Yes, sir.

8 DEPUTY COMMISSIONER SMITH: -- letters,  
9 that information so we can present that and have  
10 those documents. You can't bring in too much  
11 documentation. You can only bring in too little.  
12 Okay?

13 PRESIDING COMMISSIONER DAVIS: Take a  
14 lesson from your Entrepreneurial class thinking  
15 you're developing a business plan.

16 INMATE HERNANDEZ: Yes, sir. That's what  
17 I'll (inaudible).

18 PRESIDING COMMISSIONER DAVIS: There you  
19 go.

20 INMATE HERNANDEZ: Thank you very much  
21 for --

22 DEPUTY COMMISSIONER SMITH: We wish you,  
23 we wish you good luck sir.

24 PRESIDING COMMISSIONER DAVIS: All right.

---

25 (inaudible). Ms. Rutledge, thank you.

26 ATTORNEY RUTLEDGE: (inaudible)

27 P. HERNANDEZ C-03015 DECISION PAGE 8 7/13/06

1 PRESIDING COMMISSIONER DAVIS: Mr.

2 Turley, thank you.

3 ATTORNEY RUTLEDGE: Oh, it's my pleasure.

4 ADJOURNMENT

5 --oOo--

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23 PAROLE DENIED ONE YEAR

NOV 10 2006

24 THIS DECISION WILL BE FINAL ON: \_\_\_\_\_

25 ~~YOU WILL BE PROMPTLY NOTIFIED IF, PRIOR TO THAT~~

26 ~~DATE, THE DECISION IS MODIFIED.~~

27 P. HERNANDEZ C-03015 DECISION PAGE 9 7/13/06

79

CERTIFICATE AND

DECLARATION OF TRANSCRIBER

I, PATTY L. DURAN, a duly designated transcriber, NORTHERN CALIFORNIA COURT REPORTS, do hereby declare and certify under penalty of perjury that I have transcribed tape(s) which total one in number and cover a total of pages numbered 1 through 78, and which recording was duly recorded at the CORRECTIONAL TRAINING FACILITY, in SOLEDAD, CALIFORNIA, in the matter of the SUBSEQUENT PAROLE CONSIDERATION HEARING of PETER HERNANDEZ, CDC No. C-03015, on JULY 13, 2006, and that the foregoing pages constitute a true, complete, and accurate transcription of the aforementioned tape(s) to the best of my ability.

I hereby certify that I am a disinterested party in the above-captioned matter and have no interest in the outcome of the hearing.

Dated OCTOBER 2, 2006 at Sacramento County, California.

*Patty L. Duran*

---

Patty L., Duran, Transcriber

NORTHERN CALIFORNIA COURT RPTRS

# EXHIBIT "C"

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PSYCHOLOGICAL EVALUATION FOR THE BOARD OF PRISON TERMS  
(REVISED AUGUST 1998)  
PAROLE CONSIDERATION HEARING  
AUGUST 2004 LIFER CALENDAR

-----CORRECTIONAL TRAINING FACILITY, SOLEDAD-----  
JULY 23, 2004

This is a psychological evaluation update for the Board of Prison Terms on inmate Peter Hernandez, CDC# C-03015. This report is based on personal clinical interviews of the inmate on 03/24/04 and 07/23/04. Additionally, in preparation for this report, the Central file, unit health records, and previous psychological assessment prepared by Dr. Steven Terrini were examined. The clinical interviews and the review of all pertinent documents were for the express purpose of preparing this report.

Inmate Hernandez has served 27 years of a 7-year-to-life sentence on a conviction of first degree murder.

His last violence-based 115 occurred in 1998. Although Dr. Terrini, in his previous report, assessed inmate Hernandez as low-risk in a community setting, the Board expressed some concern about a pattern of four violence-based 115s during the 27-year period of incarceration. A review of the actual 115s documented in the Central file, and subsequent discussion with inmate Hernandez, confirm that in each instance, inmate Hernandez was the victim of an assault perpetrated by another inmate, and reacted by defending himself. The recent CDC policy of classifying a majority of fights between inmates as mutual combat serves to further cloud actual issues and facts.

During the most recent Parole Board hearing, some concern was also expressed about a history of alcohol abuse as a probable contributing factor to the instant offense. In fairness, inmate Hernandez has now been incarcerated for 27 years, and has remained dry for this entire time.

Further, with respect to the Parole Board's concern about self-help issues, inmate Hernandez has successfully completed Impact, and has several documented certificates in religious spiritual growth. Currently, he is wait-listed for Alcoholics Anonymous and We Care. However, due to the popularity of these programs and staff shortage at CTF, inmates have limited access.

During incarceration, inmate Hernandez has completed vocational programming in television production, data processing, and basic electronics.

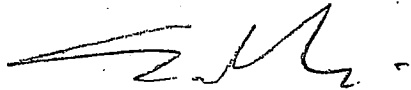
If released, inmate Hernandez plans to reside with his brother and sister-in-law in Pacoima, California. His cousin in nearby Rosemead has extended a job offer in an auto repair facility, which will utilize this inmate's skill in computer software.

Currently, inmate Hernandez is a suitable candidate for parole release consideration, with a recidivism and risk factor no greater than the average citizen in the community. Due to

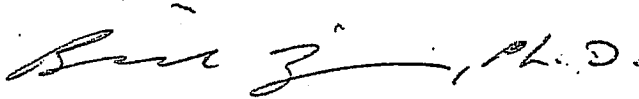
HERNANDEZ, PETER  
CDC NUMBER: C-03015  
BPT PSYCHOLOGICAL EVALUATION  
PAGE TWO

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his marketable skills and close family support, it is expected that his transition to freedom and personal responsibility will be relatively smooth.



E. W. Hewchuk, Ph.D.  
Staff Psychologist  
Correctional Training Facility, Soledad



B. Zika, Ph.D.  
Senior Supervising Psychologist  
Correctional Training Facility, Soledad

EWH/gmj

D: 07/23/04  
T: 07/27/04

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PSYCHOLOGICAL EVALUATION FOR THE BOARD OF PRISON TERMS  
(REVISED AUGUST 1998)  
PAROLE CONSIDERATION HEARING  
NOVEMBER 2002 LIFER CALENDAR

CORRECTIONAL TRAINING FACILITY, SOLEDAD  
JUNE 14, 2002

Inmate Peter Hernandez, CDC# C-03015, was seen for a psychological evaluation for the Board of Prison Terms by Steven J. Terrini, Ph.D., Staff Psychologist at the Correctional Training Facility (CTF), on 09/21/99 for the December 1999 Lifer Calendar.

According to the instructions given to Wardens and Health Care Managers by Steven Cambra, Jr. (CDC), and G. Lewis Chartrand, Jr. (BPT) in September 1998, once a mental health evaluation is completed in the new format, revised in August 1998, a new evaluation is not necessary when an inmate appears before the Board of Prison Terms unless the BPT has filed a BPT 1000A request for a new report.

Since there is no BPT 1000A request on file, a mental health evaluation was not conducted at this time.

*Bill Zika, Ph.D.*

BILL ZIKA, Ph.D.  
Senior Supervising Staff Psychologist  
CORRECTIONAL TRAINING FACILITY, SOLEDAD

BZ/gmj

D: 06/14/02

T: 06/14/02

MENTAL HEALTH EVALUATION FOR THE BOARD OF PRISON TERMS  
PAROLE CONSIDERATION HEARING  
(REVISED AUGUST 1998)  
JUNE 2001 LIFER CALENDAR

CORRECTIONAL TRAINING FACILITY, SOLEDAD  
MARCH 9, 2001

Inmate Peter Hernandez, CDC# C-03015, was seen for a mental health evaluation for the Board of Prison Terms by Steven Terrini, Ph.D., Clinical Psychologist at CTF, on 09/21/99 for the December 1999 Lifer Calendar.

According to the agreement that CDC psychologists and psychiatrists made with the Board of Prison Terms, once a mental health evaluation is completed in the new format created in 1998, a new evaluation is not necessary each time the inmate appears before the Board of Prison Terms.

Therefore, a mental health evaluation was not conducted at this time.



R. S. COATE, Psy.D.  
Senior Supervising Clinical Psychologist  
Correctional Training Facility, Soledad

RSC/gmj

D: 03/09/01

T: 03/09/01

PSYCHOLOGICAL EVALUATION FOR THE BOARD OF PRISON TERMS  
PAROLE CONSIDERATION HEARING  
DECEMBER 1999 LIFER CALENDAR

CORRECTIONAL TRAINING FACILITY, SOLEDAD  
SEPTEMBER 21, 1999

This is either the ninth or the tenth psychological evaluation for the Board of Prison Terms on inmate Peter Hernandez. This report is the product of a personal interview, conducted on 09/21/99, as well as a review of his Central file and unit health record. I have known this inmate previously from a past BPT psychological evaluation.

I. IDENTIFYING INFORMATION:

Inmate Hernandez is a 45-year-old, divorced, Hispanic male. His date of birth is 08/17/54. He stated his religion is Catholic. There were no unusual physical characteristics noted and he denied any history of nicknames or aliases.

II. DEVELOPMENTAL HISTORY:

Inmate Hernandez denied any history of birth defects, abnormalities of developmental milestones, a history of cruelty to animals, a history of arson, any significant childhood medical history, or a history of physical or sexual abuse as either a perpetrator or a victim.

III. EDUCATIONAL HISTORY:

Educationally, inmate Hernandez has a high school degree and has taken some college courses. Vocationally, he has participated in data processing, TV production and electrical maintenance.

IV. FAMILY HISTORY:

Inmate Hernandez's parents are still alive, although he has not had contact with his biological father for several years. His stepfather, who raised him, died a few years ago. His mother is in her 70s. He stays in contact with her through letters and telephone calls. He has two remaining siblings and has limited contact with them through his mother. None of his family

HERNANDEZ, PETER  
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PAGE TWO

members have ever had any significant criminal or psychiatric problems, although he felt his stepfather was an alcoholic.

V. PSYCHOSEXUAL DEVELOPMENT AND SEXUAL ORIENTATION:

Inmate Hernandez is a heterosexual male. He denied any history of sexual aggression.

VI. MARITAL HISTORY:

Inmate Hernandez was married on one occasion and later divorced. He has one child from that marriage and stays in contact with that child.

VII. MILITARY HISTORY:

Inmate Hernandez was in the Army for three years. He did not engage in any combat and received an honorable discharge.

VIII. EMPLOYMENT AND INCOME HISTORY:

In the past, inmate Hernandez has been employed in construction, working in a delivery service, working as a security officer, and doing dock work. When he paroled, he hopes to find employment in office work.

IX. SUBSTANCE ABUSE HISTORY:

Inmate Hernandez was recently on the waiting list for Alcoholics Anonymous and stated that he had a duca to start participating in that program this evening (09/21/99). He acknowledged having an alcohol problem in the past. He also used marijuana occasionally in the past. He denied ever participating in any treatment programs or placements in the community.

X. PSYCHIATRIC AND MEDICAL HISTORY:

Inmate Hernandez's most significant medical problem involved an automobile accident. He still has throat problems, he feels, as a result of that accident. He denied a history of other head injuries, suicidal behavior, hospitalizations, or a history of seizures or other neurological conditions.

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PAGE THREE

XI. PLANS IF GRANTED RELEASE:

When he paroles, he hopes to live with his brother and his brother's family. Given the information he provided to me, it would appear his parole plans are quite viable, as he has several skills that he can be employed in and has a supportive family, and his prognosis for community living is quite positive.

CLINICAL ASSESSMENT

XII. CURRENT MENTAL STATUS/TREATMENT NEEDS:

Inmate Hernandez appeared his stated age. He was appropriately dressed and groomed. He was pleasant, coherent, cooperative, calm and alert. His speech, flow of thought and affect were all within the normal range. His intellectual functioning was estimated to be above average. There was no evidence of a mood or thought disorder. His judgment appeared to be sound. He showed good insight into his commitment offense.

CURRENT DIAGNOSTIC IMPRESSIONS:

AXIS I: Alcohol Abuse, in institutional remission.  
AXIS II: No Contributory Personality Disorder.  
AXIS V: GAF = 90.

His prognosis is very positive for being able to maintain his current mental state in the community upon parole.

XIII. REVIEW OF LIFE CRIME:

Inmate Hernandez described the circumstances surrounding his commitment offense. He understood several of the key factors which played a role in this crime, including his drinking that day, as well as "acting like an egotistical tough guy." He acknowledged that he deserves whatever punishment will come to him for his actions. He stated it was never his intention to kill anyone, but simply to recover the objects that had been burglarized from his sister's home. I believe this inmate showed an above average understanding of why this crime occurred and an appropriate and genuine amount of remorse.

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CDC NUMBER: C-03015  
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PAGE FOUR

XIV. ASSESSMENT OF DANGEROUSNESS:


- A. In consideration of several factors, including his relative lack of CDC-115 violations, as well as his lack of a violent criminal history, and his prosocial attitude, his violence potential within a controlled setting is estimated to be significantly below average relative to this Level II inmate population.
- B. If released to the community, his violence potential is estimated to be no more than the average citizen in the community.
- C. The most significant risk factor which could be a precursor to violence for this inmate would be continued abuse of alcohol. I strongly believe this man understands how alcohol affected him during this crime and he seems to have a strong intention to not drink again.

XV. CLINICIAN OBSERVATIONS/COMMENTS/RECOMMENDATIONS:

- 1) This inmate is competent and responsible for his behavior. He has the capacity to abide by institutional standards and has generally done so during his incarceration period.
  - 2) This inmate does not have a mental health disorder which would necessitate treatment either during his incarceration period or following parole.
  - 3) As this man has acknowledged a problem with alcohol, I would recommend, upon parole:
    - A. Abstinence from all alcohol and illegal drugs.
    - B. Monitoring.
    - C. Mandatory attendance at self-help groups such as Alcoholics Anonymous.
- 
- 4) Inmate Hernandez has received several, very positive, past evaluations. The Category X report of 1995 stated, "We were most favorably impressed with his achievements during his incarceration and

HERNANDEZ, PETER  
CDC NUMBER: C-03015  
BPT PSYCHOLOGICAL EVALUATION  
PAGE FIVE

his current motivation and sincerity." The 1997 BPT psychological evaluation, done by Dr. Galbo, stated that he has "grown significantly in his years of incarceration," and he is "psychologically suited and stable enough to be paroled." I am in agreement with these past evaluations and believe that this man is an excellent candidate for parole consideration.

  
STEVEN J. TERRINI, Ph.D.  
Senior Supervising Psychologist (A)  
Correctional Training Facility, Soledad

SJT/gmj

d: 09/21/99  
t: 09/27/99

CALIFORNIA STATE PRISON - SOLANO  
Vacaville, California

PSYCHOLOGICAL EVALUATION  
FOR THE BOARD OF PRISON TERMS

NAME: HERNANDEZ, Peter  
CDC#: C-03015  
HSG: 21-W1L

The following is a psychological report to the Board of Prison Terms on this 43 year old Hispanic male who is serving 7 years to life for first degree murder and two counts of assault with intent of murder. This examiner interviewed Inmate Hernandez on 8-20-97 for approximately 1 hour. His central and medical files were reviewed in conjunction with this interview to ensure accuracy and completeness in this report. This exam was for the preparation of this board report only.

**BACKGROUND AND HISTORY:** Mr. Hernandez was born in Las Cruces but moved to Los Angeles with his family when he was 5. His parents were divorced when he was 6. They are both still living and his mother is in Fresno and is 65 years old. His father is in Texas but he has not communicated with his him since the divorce. The instant offense took place on April 25, 1977 when the inmate confronted three people whom he knew had burglarized his brother-in-law's home. When the victim came at him, he shot his gun killing him instantly. He shot at the other two also but they fled.

Mr. Hernandez says that his health is excellent and has had no health problems for the past 20 years. He admits he was an alcoholic and is actively involved in AA. At the time of the crime he was intoxicated and he feels that alcohol was a major cause of his problems when he was younger. He started drinking at age 14 and did not get involved with illicit drugs except marijuana occasionally.

Mr. Hernandez has had few disciplinary problems and says his last CDC-115 was in 1991 which was for fighting. He has had vocational training in data processing, electrical maintenance and TV productions. He feels that he could be actively and gainfully employed if he were to be paroled.

**MENTAL STATUS EXAMINATION:** Mr. Hernandez' intelligence is above average. He uses good judgment now and can make good decisions as well as plans for his life when he paroles. He is oriented in all spheres and has good sensitivity to other people's needs. Several projective personality tests were administered and there is no indication that he is a violent person and would pose no danger to the free community.

Several times during the interview, Mr. Hernandez was tearful and indicated he has experienced a sense of loneliness over the years. He states on the sentence completion test "Sometimes I long to have emotional ties," and "What pains me is I can't." He says he has been married for 22 years but his wife is in New Mexico and he has not been with her during the entire time of his incarceration. However, he does have one daughter with her who is 20 years old and lives in Lake Havasu, Arizona. He feels he will probably get divorced from his wife when paroled and go live with his brother in Los

NAME: HERNANDEZ, Peter  
CDC#: C-03015

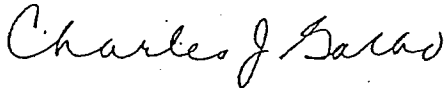
**MENTAL STATUS EXAMINATION, continued:** Angeles. All things considered, Mr. Hernandez is free from mental illness or other emotional disturbance. He is a thinking, feeling person who is trying to put the pieces of his life together again. This can be seen in the statement he makes that "My greatest fear is failing and not trying again." He adds that he feels the need to live his life over and do things much differently. At the present time he has a well developed conscience and is highly unlikely to commit a similar offense. What is most important is that he continue his AA affiliation and seek personal counseling from the Parole Outpatient Clinic in Los Angeles if he is paroled.

**PSYCHIATRIC DIAGNOSIS:**

Axis I: No diagnosis.  
Axis II: No diagnosis.  
Axis III: None.  
Axis IV: Moderate stress due to life in prison.  
Axis V: GAF = 85.

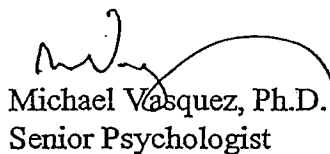
**PSYCHOLOGICAL CONCLUSIONS:** Mr. Hernandez is seen as a man who has grown significantly in his 20 years of incarceration and has developed numerous ego and intellectual resources to call upon when needed. He has learned to adapt to stressful situations when necessary and is not seen as a violent person or a parole risk when he is considered for it.

**RECOMMENDATION FOR CLASSIFICATION COMMITTEE:** Inmate Hernandez is psychologically suited and stable enough to be paroled.



Charles J. Galbo, Ph.D.  
Clinical Psychologist

**NOTED AND APPROVED:**



Michael Vasquez, Ph.D.  
Senior Psychologist

CG/dh

D: 8-20-97  
T: 9-02-97

COPY SENT TO  
INMATE: \_\_\_\_\_

# EXHIBIT "D"

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LIFE PRISONER EVALUATION REPORT  
SUBSEQUENT PAROLE CONSIDERATION HEARING  
JANUARY 2006 CALENDAR

HERNANDEZ, PETER

C03015

I. COMMITMENT FACTORS:

A. Life Crime: Remain the same as stated in previous hearings.

1. Summary of Crime: All relevant documents have been considered and that information remains the same.

2. Prisoner's Version: All relevant documents have been considered and that information remains the same.

3. Aggravating/Mitigating Circumstances:

a. Aggravating Factors: All relevant documents have been considered and that information remains the same.

b. Mitigating Factors: All relevant documents have been considered and that information remains the same.

B. Multiple Crime(s): N/A.

1. Summary of Crime: N/A.

2. Prisoner's Version: N/A.

II. PRECONVICTION FACTORS:

A. Juvenile Record: All relevant documents have been considered and that information remains the same.

B. Adult Convictions and Arrests: All relevant documents have been considered and that information remains the same.

---

C. Personal Factors: All relevant documents have been considered and that information remains the same.

HERNANDEZ, PETER

C03015

CTF-SOLEDAD

JAN/2006

**Inmate Copy**

III. POSTCONVICTION FACTORS:

- A. Special Programming/Accommodations: N/A.
- B. Custody History: All relevant documents have been considered and that information remains the same. Since his last board appearance Hernandez has been assigned as a Clerk in the Culinary. On 7/2/05, Hernandez was reassigned as the Receiving and Release Clerk where he currently remains assigned. He has remained at CTF in the general population with Medium A custody. (See Post Conviction Progress Report).
- C. Therapy and Self-Help Activities: Documents from previous hearings remain valid. Hernandez has participated in Impact, FEMA Certificates, and the Veteran's Self Help Group. (See Post Conviction Progress Reports).
- D. Disciplinary History: Documents from previous hearings remain valid. Hernandez continues to remain disciplinary free.
- E. Other: Hernandez attended his Subsequent #12 Parole Consideration Hearing on 1/6/05. Parole was denied for 1 year. The Board recommended that Hernandez remains disciplinary free; participate in self help programs; and earn positive chronos.

IV. FUTURE PLANS:

- A. Residence: All relevant documents have been considered and all information remains the same.
- B. Employment: All relevant documents have been considered and all information remains the same.
- C. Assessment: In review of Hernandez' parole plans, this counselor does not foresee any problems, however, it is recommended that Hernandez updates his support letters prior to his hearing.

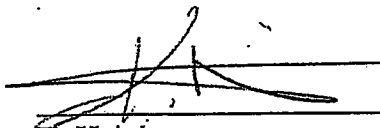
V. USINS STATUS: N/A.


VI. SUMMARY:

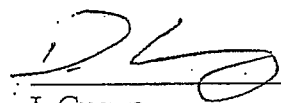
- A. Prior to release the prisoner could benefit from:
  - 1. Continuing to be disciplinary free.

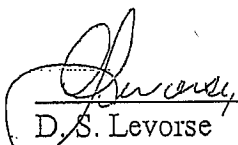
2. Participation in self-help and earn positive chronos.

- B. This report is based upon a thorough review of Hernandez' Central File and a one hour interview with Hernandez.
- C. Per the Olson Decision, Hernandez was afforded an opportunity to review his Central File. Hernandez did examine his Central File. (Refer to CDC 128-B dated 11/4/05 in the General Chrono Section of the Central File.)
- D. No accommodation was required per the Armstrong vs. Davis BPH Parole Proceedings Remedial Plan (ARP) for effective communication.

  
K. Heintz  
Correctional Counselor I  
11-17-05  
Date

 CCTI 11-17-05  
D. Carnazzo  
Correctional Counselor II  
Date

 FC (A) 11-17-05  
I. Guerra  
Facility Captain  
Date

 CAPR 11-18-05  
D. S. Levorse  
Classification and Parole Representative  
Date

BOARD OF PRISON TERMS

STATE OF CALIFORNIA

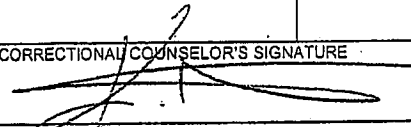
## LIFE PRISONER: POSTCONVICTION PROGRESS REPORT

- ☐ DOCUMENTATION HEARING
- ☒ PAROLE CONSIDERATION HEARING
- ☐ PROGRESS HEARING

## INSTRUCTIONS

TO CDC STAFF: DOCUMENT EACH 12-MONTH PERIOD FROM THE DATE THE LIFE TERM STARTS TO PRESENT

TO BPT STAFF: FOR EACH 12-MONTH INCREMENT APPLY THE GUIDELINES UNDER WHICH THE PAROLE DATE WAS ORIGINALLY ESTABLISHED, i.e., 0-2 MONTHS FOR PBR AND 0-4 MONTHS FOR BPT. SEE BPT §§2290 - 2292, 2410 AND 2439.

POSTCONVICTION CREDIT			REASONS
YEAR	BPT	PBR	
9/1/04 to 10/31/05			<p><b>PLACEMENT:</b> Remained at CTF in the general population.</p> <p><b>CUSTODY:</b> Medium A.</p> <p><b>VOC. TRAINING:</b> None noted this period.</p> <p><b>ACADEMICS:</b> None noted this period.</p> <p><b>WORK RECORD:</b> Hernandez was assigned as a Clerk in the Culinary until 7/2/05. He received satisfactory to above average ratings verified by CDC 101's dated 10/1/04 and 6/1/05. On 7/2/05, Hernandez was reassigned as a Receiving and Release Clerk (non-adverse). He has no CDC 101's for this period.</p> <p><b>GROUP ACTIVITIES:</b> Hernandez participated in the Veteran's self help group as verified by CDC 128B dated 3/12/05.</p> <p><b>PSYCH. TREATMENT:</b> None noted during this period.</p> <p><b>PRISON BEHAVIOR:</b> Hernandez remained disciplinary free during this period.</p> <p><b>OTHER:</b> Hernandez successfully completed an Impact workshop verified by CDC 128B dated 9/21/04.</p> <p>Hernandez has numerous FEMA certificates dated 7/14/05 located in the miscellaneous section of his Central File.</p>
CORRECTIONAL COUNSELOR'S SIGNATURE			DATE
			11-18-05
HERNANDEZ	C03015	CTF-SOLEDAD	JAN/2006

# EXHIBIT "E"

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# BOARD OF PRISON TERMS LIFE PRISONER HEARING DECISION FACE SHEET

STATE OF CALIFORNIA

☐ PAROLE GRANTED - (YES)CDC: Do not release prisoner before  
Governor's reviewRecords Use Only

Parole Release Date

YR MO DAY

Attach Prison Calculation Sheet

☒ PAROLE DENIED - (NO)*One Year. 2006 calendar.*☐ AGREED UNSUITABLE (Attach 1001A Form) FOR: \_\_\_\_\_ YEAR(S)☐ HEARING POSTPONED/REASON: \_\_\_\_\_

## PANEL RECOMMENDATIONS AND REQUESTS

## The Board Recommends:

☐ No more 115's or 128A's ☒ Stay discipline free☐ Work to reduce custody level ☐ Learn a trade\*☒ Earn positive chronos☒ Get self-help\* ☐ Get therapy\*☐ Get a GED\*☐ Recommend transfer to \_\_\_\_\_☐ Other \_\_\_\_\_

\*These programs are recommended if they are offered at your prison and you are eligible/able to participate.

Penal Code 3042 Notices ☒ Sent Date: 11-09-2004

Commitment Offense(s)

P187MURDER 1ST

Code(s)

Crime(s)

A5267641

Case #(s)

Count #(s)

Inmate Came to CDC  
3/23/79Date Life Term Began  
3/23/79Minimum Eligible Parole Date  
9/3/85☐ Initial Hearing☒ Subsequent (Hearing No.) #12

Date of Last Hearing \_\_\_\_\_

DC Representative D.S. LEVORSE, C&amp;PR.

Attorney for Prisoner M. TARDIFF

Address \_\_\_\_\_

A. Representative A. SOUSA

County LA

This form and the Board's decision at the end of the hearing is only proposed and NOT FINAL. It will not become  
final until it is reviewed.

Chair

Date

Panel Member

Date

Panel Member

Date

NAME

CDC #

INSTITUTION

CALENDAR

DATE

BERNANDEZ, PETER

C-03015

CTF-SOLEDAD

JAN. 2005

1/6/05

1P

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## CALIFORNIA BOARD OF PRISON TERMS

## D E C I S I O N

DEPUTY COMMISSIONER MEJIA: We're back on record for our decision, Mr. Hernandez

PRESIDING COMMISSIONER LAWIN: Thank you.

All parties have returned to the room. The Panel has reviewed all information received from the public and relied on the following circumstances in concluding that you, Mr. Hernandez, are not yet suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison. This is a one year denial. The denial is based certainly in part by or on rather the commitment offense which was the shooting death of Tony Sanchez. He was shot one time by the inmate. According to the inmate's version there had been a confrontation when the inmate was trying to retrieve property that had been stolen from his sister and he had been informed that Mr. Sanchez had the property and was trying to sell it. As I said, there was one earlier confrontation. The inmate left, went and got a gun and went back to the location, shot Mr. Sanchez to death, wounding the other occupants

or his friends that were there at the time. The inmate paints this to be a -- essentially that he

PETER HERNANDEZ C-03015 DECISION PAGE 1 1/6/05

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1 was -- he went there to retrieve this property and  
2 that he first saw a weapon when he had the first  
3 confrontation with Mr. Sanchez's companions. The  
4 victims instead state that Mr. Hernandez went --  
5 asked if they had any -- a lid, asked if they had  
6 any marijuana. When they said, no, he left and  
7 then returned and essentially began firing, that  
8 there was not this -- the confrontation and the  
9 way that Mr. Hernandez paints it. Regardless,  
10 Mr. Sanchez lost his life for the most trivial of  
11 reasons. Whether it was to retrieve property, to  
12 protect his honor, his family's honor, whatever it  
13 happens to have been, Mr. Sanchez should not have  
14 lost his life. And the crime shows a clear  
15 disregard for the life and suffering of others as  
16 there were multiple victims involved in the same  
17 incident. And the crime was carried out in a  
18 cruel fashion on unsuspecting victims. The next  
19 reason for our denial would be the inmate's parole  
20 plans. He does not have reasonable parole plans.  
21 He says he'll live with a brother. We have no  
22 letters of support for a number of years. He says  
23 that he will work for a cousin. Again, letters  
24 are very old. Yes, there has been a history of  
25 family support, but nothing recent. We do see  
26 that he maintains contact. There's a Christmas  
27 PETER HERNANDEZ C-03015 DECISION PAGE 2 1/6/05

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1 card with a postmark of 2003, but nothing to  
2 indicate that he's welcome to live with his  
3 brother nor any recent letter stating he can live  
4 with his cousin. The next reason for our denial  
5 would be the Panel's belief that the inmate has  
6 not yet sufficiently participated in self-help  
7 programs. Also, the District Attorney's Office  
8 responded to PC 3042 Notices. They are opposed to  
9 a finding of parole suitability, as is the Los  
10 Angeles Police Department. By most accounts,  
11 Mr. Hernandez had a stable social history. He had  
12 served honorably in the military, been discharged,  
13 had gone to high school, had not graduated, but he  
14 had been working. There is some use of alcohol  
15 and marijuana. There's a contradiction I guess in  
16 Mr. Hernandez's life because of all these positive  
17 things and then he ends up murdering Mr. Sanchez  
18 and now all of a sudden alcohol and marijuana are  
19 part of his lifestyle. So there's really a  
20 contradiction there. The Panel finds that the  
21 inmate needs participation in self-help for a  
22 variety of reasons. First of all, I really,  
23 Mr. Hernandez, look at your ability to deal with  
24 situations in an appropriate fashion when I look

---

25 at your lack of parole plans because here's a  
26 situation where I can't help but project what you

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1 did in 1977 on this situation. I don't know what  
2 it is, if it's honor, if it's -- if it's respect,  
3 I don't know what it is that's keeping you from  
4 asking your family for support, if you don't want  
5 to ask people. But that indicates you're not  
6 willing to ask for help when you need it, and  
7 that's a negative trait. You need to be able to  
8 ask for help when you need it, that's how you  
9 solve situations. And you need help here; you  
10 need help from your family. Like I said before,  
11 you've got the key to get out of here. We're not  
12 going to let you out, no Panel's going to let you  
13 out, with no offers of residence and no offers of  
14 employment. The Panel commends Mr. Hernandez for  
15 the fact that he's not had a 115 in six years,  
16 almost seven years, that last one was February 19,  
17 1998 for mutual combat, it was the last of four;  
18 for the fact that he's not had a 128(a) counseling  
19 chronos in four years, the last one December 31,  
20 2000, the last of seven for disobeying staff.  
21 He's to be commended for having acquired his GED  
22 high school equivalency early on, for taking some  
23 college courses, for completing data processing,  
24 spending time in and/or completing basic  
25 electronics and TV production. He's to be  
26 commended for his recent participation in Impact,  
27 PETER HERNANDEZ C-03015 DECISION PAGE 4 1/6/05

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1 taking Emergency Management Institute or FEMA  
2 courses, for the completion of bible  
3 correspondence courses and unverified but his  
4 self-reported participation in the Veterans Group  
5 and this Pre-Release Group. He's certainly to be  
6 commended for his work ethic. He has received  
7 laudatory chronos while serving as the Protestant  
8 chapel clerk, in receiving and release and in the  
9 culinary kitchen as a clerk, which is his current  
10 position. But these positive aspects do not yet  
11 outweigh the factors of unsuitability. I do also  
12 want to note for the record that the July 23, 2004  
13 psychological report by Dr. Hewchuk is supportive  
14 of release. We make the following  
15 recommendations, Mr. Hernandez. One, that you  
16 remain disciplinary-free; two, when it's available  
17 to you, that you continue your participation in  
18 self-help. I wish I could give you a 115 or a 128  
19 for not having parole plans because maybe that  
20 would spur you into taking some action. I don't  
21 know what it's going to take. I don't know how  
22 many times and how many ways to tell you, but it's  
23 very important. And I wish you good luck.

24 INMATE HERNANDEZ: Just for the record, that  
25 card is not 2003,

26 PRESIDING COMMISSIONER LAWIN: Which card?

27 PETER HERNANDEZ C-03015 DECISION PAGE 5 1/6/05

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1 INMATE HERNANDEZ: It's recent.

2 PRESIDING COMMISSIONER LAWIN: Right, this  
3 Christmas.

4 INMATE HERNANDEZ: Yes.

5 PRESIDING COMMISSIONER LAWIN: I'm sorry,  
6 December 2004, that's what I meant. I'm sorry.  
7 Thank you.

8 DEPUTY COMMISSIONER MEJIA: Good luck to  
9 you, sir.

10 INMATE HERNANDEZ: Thank you.

11 PRESIDING COMMISSIONER LAWIN: That  
12 concludes this hearing. It is 12:43.

13 --oOo--

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23 PAROLE DENIED ONE YEAR

24 THIS DECISION WILL BE FINAL ON MAY - 6 2005

25 YOU WILL BE PROMPTLY NOTIFIED IF, PRIOR TO THAT  
26 DATE, THE DECISION IS MODIFIED.

27 PETER HERNANDEZ C-03015 DECISION PAGE 6 1/6/05

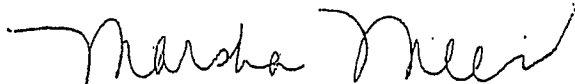
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CERTIFICATE AND  
DECLARATION OF TRANSCRIBER

I, Marsha Mees, a duly designated transcriber, CAPITOL ELECTRONIC REPORTING, do hereby declare and certify under penalty of perjury that I have transcribed tape(s) which total one in number and cover a total of pages numbered 1 through 79, and which recording was duly recorded at CORRECTIONAL TRAINING FACILITY, at SOLEDAD, CALIFORNIA, in the matter of the SUBSEQUENT PAROLE CONSIDERATION HEARING of PETER HERNANDEZ, CDC No. C-03015 on JANUARY 6, 2005, and that the foregoing pages constitute a true, complete, and accurate transcription of the aforementioned tape(s) to the best of my ability.

I hereby certify that I am a disinterested party in the above-captioned matter and have no interest in the outcome of the hearing.

Dated January 21, 2005 at Sacramento County, California.



---

Marsha Mees  
Transcriber  
CAPITOL ELECTRONIC REPORTING

# EXHIBIT "F"

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LIFE PRISONER EVALUATION REPORT  
SUBSEQUENT PAROLE CONSIDERATION HEARING  
2004 CALENDAR

HERNANDEZ, PETER

C03015

I. COMMITMENT FACTORS:

A. Life Crime: Count 1: Murder First (PC 187), Count 2/3: Assault with Intent to Commit Murder, with Use of a Firearm (Pistol) (PC 217/12022.5): Sentence 7 years to Life. Case Number: A334928. Date received in CDC: 3/23/79. MEPD: 9/3/85. Victim: Tony Sanchez, age unknown.

1. Summary of Crime: On 4/25/77, at approximately 9:00 p.m., Peter Hernandez and co-defendant, Jose Montez, approached three Mexican/American males in a residential area in Los Angeles. Following a brief conversation, Hernandez pulled a gun from his coat, fired a shot at victim Tony Sanchez at point blank range, killing him with a shot to the heart. Victims Rosales and Rodriguez ran from the scene but were pursued by Hernandez who continued firing the gun, striking both men in the leg as crime partner Montez yelled, "get them, get them." After emptying the weapon, Hernandez and Montez returned to the van that Hernandez had been driving and fled from the scene. Hernandez was later identified by the wounded victims. He and Montez were apprehended at their residences on the following morning. Subsequent investigation revealed that Hernandez had attempted to purchase marijuana from the victims and, when advised that they had none, opened fire. Both Hernandez and Montez denied any involvement in the crime, maintaining this denial through three trials, the third of which resulted in Hernandez' conviction for the present case and Montez' conviction for Murder Second Degree. It was noted that all three victims were known gang members and that the motive for the crime was believed by the District Attorney's Office to have been gang related. Hernandez continued to maintain his innocence until exhaustion of the appeals process at which time he admitted his guilt. (Information acquired from the 6/15/88 Diagnostic Unit Evaluation, pg 2-3; POR, pg 5-7, and Appellate Decision dated 6/20/81, pgs 8-12, 14-15).

2. Prisoner's Version: In an interview for this report, Hernandez stated that his version of the offense summary remains the same as the one presented

HERNANDEZ, PETER

C03015

CTF-SOLEDAD

SENT TO I/M ON

9.3.04

in the report for his January, 1990 Subsequent Hearing #5. In that report, Hernandez stated the following:

On the evening of April 25, 1977, I was at a friend's house drinking beer while we talked about the upcoming Cinco De Mayo celebration being planned for the community the following month. During the meeting or sometime after, I was informed of some guys being responsible for the burglary of my sister's home. After the meeting, I decided to go find out who these guys were, hoping to recover my sister's property. A friend volunteered to come along with me since he knew some of the guys around the area where they hang out. We drove approximate five or six miles across town to what is known as the "West Side" of Los Angeles.

On the corner of 24th Street and Magnolia, I pulled to the side, and my friend called some guy over and asked him if he knew a guy named Tito. He said, "Yeah, he lives over there," pointing to a green house not too far from the opposite corner. We then went around the block, coming to a stop and parking in front of the green house. While I was parking, I saw three guys on the porch of the house. I told my companion to wait, that I'd be back. As I walked over to the gate, one of the guys went inside and another started to walk towards the front of the gate. The third guy just stayed on the front of the porch. As I stopped at the gate and watched the guy stop about ten feet from the gate, I asked him if he knew a guy named Tito, who I was told lived here. He said, "Who are you? What do you want with him?" or words to that affect. As I told him that I wanted to talk to Tito about some hot stuff that he was trying to sell, the guy I was talking to looked familiar, so I asked him if his name was Noe. He then looked surprised and said, "No". (Noe is a guy who I knew years ago when I was in junior high school; it turned out that this was the same guy.) After an exchange of words, a guy came running up from the corner, the same guy who had told me and my companion that Tito lived at this house. He walked up and said to Noe, "What's going on? These guys are looking for Tito." By then, the guy on the porch started walking towards us. Then Noe said, "Man, you better split. Get the fuck out of here." I said, "No, I want to talk to Tito." The guy from the porch got close to Noe and asked him what I wanted from Tito. After Noe told him, the guy pulled out a gun and pointed it towards me and told me in a very angry way that I'd better leave or he'd blow my head off. Noe then said, "Go, man, you don't belong around here." Being frightened by the gun, I said, "Okay, man, I'm going. I'm going." So we left.

---

My friend brought out the idea that he knew where to get a gun and that we should go back. My fright turned to anger, and I agreed. We drove around the neighborhood for awhile trying to find a gun. In the meantime,

I bought more beer, and we drank. Finally, we drove to some apartments where my friend got out and went inside. A few moments later, he came out and showed me a gun. I took the gun and asked him if he was loaded, and he said, "Yes". I put the gun inside my jacket pocket and drove back to find Tito. As we passed by the corner of 24th and Magnolia, we saw three guys not too far from the corner. They looked like the same guys we had seen earlier. I went around the block and parked right in front of them, across the street. I told my friend to wait, but he said that he would get out with me.

We both walked towards the guys who were standing on the sidewalk. As we walked, I had my hands in my jacket pockets. The guys looked us over and asked us what we wanted. I told them I was looking for Tito because I wanted to talk to him. One of them said, "I'm Tito. What do you want?". One of the other guys said something like, "Yeah, they were looking for you earlier." I told Tito that I wanted the stolen stuff that he had because it belonged to my sister, and I wanted it back. I told him that I didn't want any trouble. He looked at me and said, "Fuck you, man, who do you think you are?" He then began cursing in a threatening manner. He then started to charge at me, pulling his hands out from his pockets. I thought at the moment he was going for a gun. In a quick motion (I was trained and awarded the expert badge with the .45 caliber pistol in the U.S. Army), I pulled out my gun and shot him. I panicked for a while and, as the other guys ran, I began to shoot at them, too, chasing them a few yards before the gun went empty. Then my friend and I ran back to the van and left. I remember being very scared and my heart pumping faster than I could breathe.

3. Aggravating/Mitigating Circumstances:

a. Aggravating Factors:

- During the commission of the crime, the inmate had a opportunity to cease but instead continued.
- The manner in which the crime was committed created a potential for serious injury to persons other than the victims of the crime.
- There were multiple victims involved.
- Use of a weapon (pistol).
- The inmate was on probation at the time the crime was committed.

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b. Mitigating Factors:

- Although the inmate was on probation he had a minimal history of criminal behavior.

B. Multiple Crime(s): N/A.

1. Summary of Crime: N/A.
2. Prisoner's Version: N/A.

II. PRECONVICTION FACTORS:

A. Juvenile Record: None noted.

B. Adult Convictions: Hernandez' arrest history began on 5/13/76 when he was arrested by the Los Angeles Police on a charge of Possession/Manufactured/Sell Dangerous Weapon, PC 12020(a). He was released on 5/14/76 having been detained only due to insufficient evidence. He was again arrested on 1/8/77 by Los Angeles Police on a charge of Robbery, PC 211(a). He pleaded guilty on 2/1/77 to Taking a Vehicle Without Owner's Consent and was sentenced to 36 months summary probation without supervision and a \$32.00 restitution. On 5/1/78 Hernandez was convicted on a misdemeanor charge of PC 484 and was sentenced to 24 months probation with four days in jail and 90 days jail suspended.

C. Personal Factors: On 8/17/54, Peter Hernandez Jr. was born in Las Cruces, Mexico, the second of two children of Peter Hernandez Sr. and the former Martha Rodriguez. Hernandez was raised by his mother in part due to his parents divorcing when he was two years old. Several years following her divorce, his mother entered a common-law relationship that was formalized in 1972. Hernandez claims he had a satisfactory relationship with all family members including his stepfather and two half-brothers. Hernandez reports that no other family member has an arrest record and there is no family history of mental illness. He notes that his stepfather was an alcoholic.

Hernandez attended Belmont High School but dropped out to enlist in the U.S. Army. He served in the Army from 2/73 until 2/76 and received an honorable discharge. He achieved the rank of E-4 and served seven months in Germany. While in the Army, Hernandez began the occasional use of marijuana and social use of alcohol. He subsequently began spending most of his off-duty time drinking. In 1975 he married Josie Garcia while still in the Army. The relationship produced one daughter, Zita. There is no evidence of any sexual deviation, physical or mental disorder.

**III. POSTCONVICTION FACTORS:**

- A. Special Programming/Accommodations: N/A.
- B. Custody History: Hernandez remains Medium A custody level and has been housed at CTF throughout this review period.
- C. Therapy and Self-Help Activities: Since Hernandez' last BPT Hearing he has attended numerous Prison Fellowship Ministries Classes (Protestant Faith) and Impact Workshop's. (See Post Conviction Progress Report).

Hernandez stated he is currently on the waiting list for the following programs: In Cell Study Business Course, We Care Self-Help Group, and AA. Furthermore, Hernandez states he is a member of the Balance Reentry Activity Group (BRAG) and CTF Veterans Group (Army). Hernandez states he has tried to obtain documentation to verify his statements, but has been unsuccessful.

- D. Disciplinary History: Hernandez continues to remain disciplinary free.
- E. Other: Hernandez attended his Subsequent #11 Parole Consideration Hearing on 11/7/01. Parole was denied for 1 year. The Board recommended that Hernandez remains disciplinary free, and participate in self-help programs and group therapy.

**IV. FUTURE PLANS:**

- A. Residence: Hernandez continues to plan to reside with his brother Michael and sister-in-law Kim Montez at 11150 Glen Oaks Boulevard, Unit 227, in Pacoima, California. His telephone number is (818) 686-1152.
- B. Employment: Hernandez is certain that he will be able to secure employment with Marco Sanchez, a cousin who owns auto body/fender and mechanics shops in Rosemead and in San Fernando Valley. He would be employed for office clerical duties.
- C. Assessment: In review of Hernandez parole plans, this counselor does not foresee any problems. However, it was recommended that he obtain updated support letters since his current ones are dated 1998.

**V. USINS STATUS: N/A.**

**VI. SUMMARY:**

- A. Considering the commitment offense, prior prison record and prison adjustment this writer believes Hernandez would pose a low degree of threat to the public if released. Hernandez has been incarcerated for over 25 years on a seven to Life sentence. Hernandez has also been given a parole date twice and both times been revoked by the Governor. Although I have not had alot of interaction with Hernandez throughout the year, he has taken great steps in the right direction. He has remained disciplinary free, has adequate parole plans, and maintains a good rapport with staff and inmates. Hernandez has received laudatory chronos from Correctional Officers W. Cleaver, G. Lavelle and Reverne Lindsey. They state that his work performance, attitude, and attendance are excellent.

Hernandez has taken responsibility for his crime and has expressed deep remorse for what he has done. He fully intends to better himself while incarcerated and will continue working on self-improvement upon his release.

A combination of the above factors, as well as support letters from family and friends, help point Hernandez in the direction of a successful parole.

- B. Prior to release the prisoner could benefit from:
1. Continuing to be disciplinary free.
  2. Participation in self-help and therapy programs.
- C. This report is based upon a thorough review of the inmate's Central File and a (1) hour interview with Hernandez.
- D. Per the Olson Decision, Hernandez was afforded an opportunity to review his Central File. (Refer to CDC 128B dated 8/10/04 in the General Chrono Section of the Central File).
- E. No accommodation was required per the Armstrong vs. Davis BPT Parole Proceedings Remedial Plan (ARP) for effective communication.

BOARD OF PRISON TERMS

STATE OF CALIFORNIA

## LIFE PRISONER: POSTCONVICTION PROGRESS REPORT

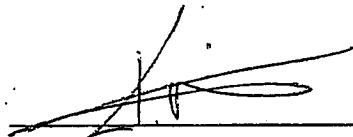
- ☐ DOCUMENTATION HEARING
- ☒ PAROLE CONSIDERATION HEARING
- ☐ PROGRESS HEARING


## INSTRUCTIONS

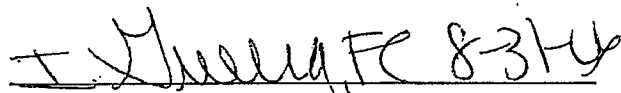
TO CDC STAFF: DOCUMENT EACH 12-MONTH PERIOD FROM THE DATE THE LIFE TERM STARTS TO PRESENT

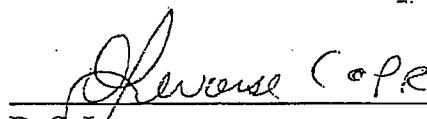
TO BPT STAFF: FOR EACH 12-MONTH INCREMENT APPLY THE GUIDELINES UNDER WHICH THE PAROLE DATE WAS ORIGINALLY ESTABLISHED, i.e., 0-2 MONTHS FOR PBR AND 0-4 MONTHS FOR BPT. SEE BPT §§2290 - 2292, 2410 AND 2439.

POSTCONVICTION CREDIT			REASONS
YEAR	BPT	PBR	
3/04 to 8/04			<p><b>PLACEMENT:</b> Remained at CTF in the general population.</p> <p><b>CUSTODY:</b> Medium A.</p> <p><b>VOC. TRAINING:</b> None noted this period.</p> <p><b>ACADEMICS:</b> None noted this period.</p> <p><b>WORK RECORD:</b> Hernandez was a Religious Clerk from 8/22/02 thru 7/14/04 and received above average ratings verified by CDC 101 dated 1/17/03. On 7/15/04 Hernandez was assigned in the Culinary as a Clerk.</p> <p><b>GROUP ACTIVITIES:</b> Participated in Prison Fellowship verified by a certificate dated 6/5/04.</p> <p><b>PSYCH. TREATMENT:</b> None noted during this period.</p> <p><b>PRISON BEHAVIOR:</b> Hernandez remained disciplinary free during this period.</p> <p><b>OTHER:</b> None.</p>
CORRECTIONAL COUNSELOR'S SIGNATURE			DATE
HERNANDEZ			8-31-04
C03015			CTF-SOLEDAD

  
K. Heiny 8-31-04  
Correctional Counselor I Date

  
D. Pherigo 8-31-04  
Correctional Counselor II Date

  
I. Guerra 8-31-04  
Facility Captain Date

  
D. S. Levorse 9-1-04  
Classification and Parole Representative Date

# EXHIBIT "G"

---

The Judge Division  
①

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MELVYN COLEMAN,

Petitioner,

No. CIV S-96-0783 LKK PAN P

vs.

BOARD OF PRISON TERMS, et al.,

Respondent.

ORDER

Petitioner, a state prisoner proceeding pro se, has filed this application for a writ of habeas corpus. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On December 22, 2004, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Respondent has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

(2)

*Judges decision*

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed December 22, 2004, are adopted in full; and
2. The petition for habeas corpus will be granted unless, within 60 days, respondent provides a fair parole suitability hearing, conducted by a board free of any prejudice stemming from a gubernatorial policy against parole for murderers.

DATED: May 19, 2005.

/s/Lawrence K. Karlton  
LAWRENCE K. KARLTON  
SENIOR JUDGE -  
UNITED STATES DISTRICT COURT

United States District Court  
for the  
Eastern District of California  
December 22, 2004

bd

\* \* CERTIFICATE OF SERVICE \* \*

2:96-cv-00783

Coleman

v.

Board of Prison Term

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 22, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

Tami M Warwick Attorney General's Office for the State of California PO Box 944255 1300 I Street Suite 125 Sacramento, CA 94244-2550	TM/PAN of California AR/LKK
---	-----------------------------------

Ann Catherine McClintock  
Federal Defender  
801 I Street  
Third Floor  
Sacramento, CA 95814

Jack L. Wagner, Clerk

BY: 

Deputy Clerk

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The case pages 1-11

**FILED**

SEP 22 2004

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

United States District Court  
Eastern District of California

Melvyn H. Coleman,  
Petitioner,  
vs.

No. Civ. S-96-0783 LKK PAN P  
Findings and Recommendations

Board of Prison Terms, et al.,  
Respondents.

-oOo-

Petitioner seeks a writ of habeas corpus.

In his November 14, 1997, second amended petition petitioner claims his federal due process guarantee was violated because the California Board of Prison Terms (Board) has failed to conduct a fair parole suitability hearing.

In 1974 petitioner was convicted of first degree murder, attempted murder, first degree robbery, first degree burglary and other charges. The victims, Mr. And Mrs. Stewart, returned to their home while petitioner was burglarizing it; he then

*the case*

1 approached before they got out of their car and robbed and shot  
2 them, killing Mr. Siewart and seriously wounding Mrs. Siewart.  
3 Petitioner had a prior juvenile record.

4 Under California law, a prisoner including a convicted  
5 murderer serving an indeterminate term (i.e., seven years to  
6 life) is entitled to a hearing before a panel composed of members  
7 of the Board to determine his suitability for parole. By  
8 statute, parole at some point normally is appropriate and the  
9 Board "shall set a release date, unless it determines that the  
10 gravity of the current convicted offense or offenses, or the  
11 timing and gravity of current or past convicted offense or  
12 offenses, is such that consideration of the public safety  
13 requires a more lengthy period of incarceration. . . ." Cal.  
14 Penal Code § 3041(b). Procedures governing suitability hearings  
15 are set forth in Penal Code § 3041.5 (providing prisoners with  
16 notice and an opportunity to be heard and requiring a written  
17 statement of reasons if the panel refuses to set a parole date).  
18 Regulations prescribe factors for the panel to consider in  
19 determining whether each prisoner is suitable or unsuitable for  
20 parole. 15 CAC § 2281.<sup>1</sup>

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21  
22 <sup>1</sup> Factors supporting a finding of unsuitability include: (1) whether the  
23 prisoner's offense for which he is confined was committed in an "especially  
24 heinous, atrocious or cruel manner"; (2) the prisoner's record of violence prior  
25 to the offense; (3) whether the prisoner has an unstable social history; (4)  
26 whether the prisoner has committed sadistic sexual offenses; (5) whether the  
prisoner has a lengthy history of severe mental problems related to the offense;  
and (6) whether the prisoner has engaged in serious misconduct in prison or jail.  
Factors supporting a finding of suitability include: (1) whether the prisoner has  
a juvenile record; (2) whether the prisoner has experienced reasonably stable  
relationships with others; (3) whether the prisoner shows signs of remorse; (4)

*The Case*

1       Petitioner presents evidence that under Governors Wilson and  
 2 Davis the Board disregarded regulations ensuring fair suitability  
 3 hearings and instead operated under a sub rosa policy that all  
 4 murderers be found unsuitable for parole. The record shows that  
 5 between 1992 and 1998 less than one percent of the prisoners in  
 6 this group were released on parole. During the previous period  
 7 the parole rate had been about four percent. Petitioner presents  
 8 sworn testimony that the policy was enforced by (1) appointing  
 9 Board members less likely to grant parole and more willing to  
 10 disregard their statutory duty; (2) removing Board members more  
 11 likely to grant parole; (3) reviewing decisions finding a  
 12 prisoner suitable and setting a new hearing before a different  
 13 panel; (4) scheduling rescission hearings for prisoners who had  
 14 been granted a parole date; (5) re-hearing favorable rescission  
 15 proceedings and hand-picking panels to ensure the desired  
 16 outcome; (6) panel members agreeing upon an outcome in advance of  
 17 the hearing; and (7) gubernatorial reversal of favorable parole  
 18 decisions. See e.g., declaration of former BPT Commissioner  
 19 Albert Leddy (Leddy) paras. 5, 6, 8-17, 20 (attached as Ex. 17 to  
 20 petitioner's March 27, 2003, motion for discovery); deposition of  
 21 Leddy taken in In re Fortin, et al., San Diego Superior Court

22  
 23 whether the prisoner committed his crime as the result of significant stress in  
 24 his life; (5) whether the prisoner suffered from Battered Woman Syndrome when she  
 25 committed the crime; (6) whether the prisoner lacks any significant history of  
 26 violent crime; (7) whether the prisoner's present age reduces the probability of  
 recidivism; (8) whether the prisoner has made realistic plans for release or has  
 developed marketable skills that can be put to use on release; and (9) whether  
 the prisoner's institutional activities indicate an enhanced ability to function  
 within the law upon release. 15 CAC § 2281.

*the case*

1 case number HSC10279 at 18-19, 47-50, 56-59, 61-63, 65-66, 88-89,  
2 95, 97-99, 102, 106, 110, 118 & 126 (attached as Ex. 10 to  
3 petitioner's March 27, 2003, motion for discovery); deposition of  
4 former BPT Commissioner Edmund Tong taken in Kimble v. Cal. BPT,  
5 C.D. Cal. case number CV 97-2752 at 42-43, 45-47, 71, 73, 80-82,  
6 85-86, 96, 103, 105, 107 & 109 (lodged December 30, 2003).<sup>2</sup>

7 The unrefuted record shows the no-parole-for-murderers  
8 policy existed and continued under Governor Davis. In In re  
9 Rosencrantz, the California Supreme Court took note of evidence  
10 presented in the state trial court establishing that the Board  
11 held 4800 parole suitability hearings between January 1999  
12 through April 2001, granting parole to 48 murderers (one  
13 percent). 29 Cal. 4th 616, 685 (2003). Of those 48, the  
14 governor reversed 47 of the Board's decisions and only one  
15 murderer out of 4800 actually was released on parole. Id.  
16 Petitioner in Rosenkrantz also submitted evidence of the  
17 following interview of Governor Davis reflected in the April 9,  
18 1999, edition of the Los Angeles Times: " . . . [T]he governor  
19 was adamant that he believes murderers - even those with second-  
20 degree convictions - should serve at least a life sentence in  
21 prison. [Para.] Asked whether extenuating circumstances should  
22

23 <sup>2</sup> Meanwhile, the annual cost to taxpayers of conducting these "pro forma"  
24 hearings is enormous, amounting to millions of dollars per year. See Exhibit 7  
25 to petitioner's March 27, 2003, motion for discovery (California Legislative  
26 Analyst's Office - Analysis of the 2000-01 Budget Bill for the Board of Prison  
Terms criticizing proposed \$19 million annual budget and noting huge cost of  
additional incarceration resulting from no-parole policy).

*The Case*

1 be a factor in murder sentences, the governor was blunt: "No.  
2 Zero . . . They must not have been listening when I was  
3 campaigning. . . . If you take someone else's life, forget it.  
4 I just think people dismiss what I said in the campaign as either  
5 political hyperbole or something that I would back away from . .  
6 . . . We are doing exactly what we said we were going to do.""  
7 29 Cal. 4th at 684.

8 Respondent does not refute the alleged facts. Instead,  
9 respondent argues that, assuming <sup>arguendo</sup> prisoners in California  
10 have an interest in a parole date protected by the due process  
11 clause, constitutional requirements are met so long as there is  
12 "some evidence" supporting the findings petitioner is unsuitable.  
13 See Oppo. at 7:20 (so long as "some evidence" standard is met,  
14 "the Board decisions could not have been arbitrary.") For the  
15 reasons explained, this court rejects that claim. As this court  
16 previously has found, there always will be "some evidence" that  
17 can be used to explain a denial or rescission under the  
18 circumstances. Federal due process requires more.

19 California's parole scheme gives rise to a protected liberty  
20 interest in release on parole. McQuillion v. Duncan, 306 F.3d  
21 895, 902 (2002); Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389,  
22 1390 (9th Cir. 1987); Greenholtz v. Inmates of Nebraska Penal &  
23 Correctional Complex, 442 U.S. 1 (1979); Biggs v. Terhune, 334

*the case*

1 F.3d 910, 915 (9th Cir. 2003); In re Rosenkrantz, 29 Cal. 4th 616  
2 (2003).<sup>3</sup>

3 Therefore, petitioner is entitled to the process outlined in  
4 Greenholtz, viz., notice, opportunity to be heard, a statement of  
5 reasons for decision, and limited right to call and cross-examine  
6 witnesses. The determination that petitioner is unsuitable for  
7 parole must be supported by some evidence bearing some indicia of  
8 reliability.

9 These guarantees do not exhaust petitioner's right to due  
10 process. The fundamental core of due process is protection  
11 against arbitrary action:

12 The principal and true meaning of the phrase has never  
13 been more tersely or accurately stated than by Mr.  
14 Justice Johnson, in Bank of Columbia v. Okely, 17 U.S.  
15 235, 4 Wheat. 235-244, 4 L.Ed. 449 [(1819)]: "As to the  
16 words from Magna Charta, incorporated into the  
17 Constitution of Maryland, after volumes spoken and  
18 written with a view to their exposition, the good sense  
19 of mankind has at last settled down to this: that they  
20 were intended to secure the individual from the  
21 arbitrary exercise of the powers of government,  
22 unrestrained by the established principles of private  
23 right and distributive justice."

24 Hurtado v. California, 110 U.S. 516, 527, (1884). "The  
25 concessions of Magna Charta were wrung from the king as  
26 guaranties against the oppressions and usurpations of his

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<sup>3</sup> That is so because the parole statute, Penal Code § 3041, uses mandatory language ("The panel or board shall set a release date unless it determines" further incarceration is necessary in the interest of public safety) which "creates a presumption that parole release will be granted," unless the statutorily defined determinations are made. Board of Pardons v. Allen, 482 U.S. 369, 378 (1987) (quoting Greenholtz, 442 U.S. at 12). As of 1988, by amendment of the state constitution, a parole date given can be withdrawn by the Governor under the same factors considered by the Board.

*the case*

1 prerogative." Id. at 531. "The touchstone of due process is  
2 protection of the individual against arbitrary action of  
3 government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974),  
4 citing Dent v. West Virginia, 129 U.S. 114 (1889).

5 A government official's arbitrary and capricious exercise of  
6 his authority violates the essence of due process, contrary to  
7 centuries of Anglo-American jurisprudence. See Yick Wo v.  
8 Hopkins, 118 U.S. 356, 369 (1886) ("When we consider the nature  
9 and the theory of our institutions of government, the principles  
10 upon which they are supposed to rest, and review the history of  
11 their development, we are constrained to conclude that they do  
12 not mean to leave room for the play and action of purely personal  
13 and arbitrary power."); United States v. Lee, 106 U.S. 196, 220  
14 (1882) ("No man in this country is so high that he is above the  
15 law. No officer of the law may set that law at defiance with  
16 impunity. All the officers of the government from the highest to  
17 the lowest, are creatures of the law and are bound to obey it.  
18 It is the only supreme power in our system of government, and  
19 every man who by accepting office participates in its functions  
20 is only the more strongly bound to submit to that supremacy, and  
21 to observe the limitations which it imposes upon the exercise of  
22 the authority which it gives."); U.S. v. Nixon, 418 U.S. 683,  
23 695-96 (1974) (rule of law is "historic commitment"); Accardi v.  
24 O'Shaughnessy, 347 U.S. 260, 267-68 (1954) (Attorney General must  
25 abide by regulations and cannot dictate immigration board's  
26 exercise of discretion in decision on application to suspend

*the case*

1 deportation; remedy is new hearing where board will exercise it's  
2 discretion free from bias).

3 Concomitant to the guarantee against arbitrary and  
4 capricious state action is the right to a fact-finder who has not  
5 predetermined the outcome of a hearing. See Withrow v. Larkin,  
6 421 U.S. 35 (1975) (a fair trial in a fair tribunal is a basic  
7 requirement of due process, and this rule applies to  
8 administrative agencies which adjudicate as well as to courts);  
9 Edwards v. Balisok, 520 U.S. 641 (1997) (recognizing due process  
10 claim based on allegations that prison disciplinary hearing  
11 officer was biased and would suppress evidence of innocence);  
12 Bakalis v. Golembeski, 35 F.3d 318, 326 (7th Cir. 1994) (a  
13 decision-making body "that has prejudged the outcome cannot  
14 render a decision that comports with due process").

15 Courts too numerous to list have recognized that the right  
16 to a disinterested decision-maker, who has not prejudged the  
17 case, is part of the fundamental guarantee against arbitrary and  
18 capricious government conduct in the California parole context.  
19 See, e.g., Rosenkrantz, 29 Cal. 4th at 677 (parole decision "must  
20 reflect an individualized consideration of the specified criteria  
21 and cannot be arbitrary and capricious"); In re Ramirez, 94 Cal.  
22 App. 4th 549, 563 (2001) ("some evidence" standard is "only one  
23 aspect of judicial review for compliance with minimum standards  
24 of due process" (citing Balisok) and Board violates due process  
25 if its decision is "arbitrary and capricious"); In re Minnis, 7  
26 Cal. 3d 639 (1972) (blanket no-parole policy as to certain

*the case*

1 category of prisoners is illegal); In re Morrall, 102 Cal. App.  
2 4th 280 (2003) (same). The guarantee of neutral parole officials  
3 in a suitability hearing is just as fundamental as the right to a  
4 neutral judge in a court proceeding. Compare Sellars v.  
5 Procunier, 641 F.2d 1295 (9th Cir. 1981) (holding that California  
6 parole officials, analogous to judges, are entitled to absolute  
7 immunity).

8 The Ninth Circuit previously has acknowledged California  
9 inmates' due process right to parole consideration by neutral  
10 decision-makers. See O'Brenski v. Maas, 915 F.2d 418, 422 (9th  
11 Cir. 1990). In that case the appellate court found that a  
12 neutral parole panel at a new hearing would reach the same  
13 outcome and so denied relief. The record in this case simply  
14 will not permit the same conclusion. The requirement of an  
15 impartial decision-maker transcends concern for diminishing the  
16 likelihood of error. As the Supreme Court clearly held in  
17 Balisok a decision made by a fact-finder who has predetermined  
18 the outcome is per se invalid -- even where there is ample  
19 evidence to support it. 520 U.S. at 648.

20 Petitioner presents a convincing case that a blanket policy  
21 against parole for murderers prevented him from obtaining a  
22 parole suitability determination made after a fair hearing.  
23 Respondent offers nothing to counter petitioner's showing.

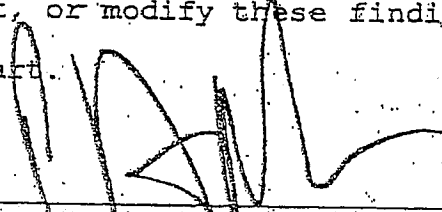
24 Accordingly, the court hereby recommends that the petition  
25 for habeas corpus be granted unless, within 60 days of the  
26 district court's adoption of these recommendations, respondent

*the case*

1 provides a fair parole suitability hearing, conducted by a board  
2 free of any prejudice stemming from a gubernatorial policy  
3 against parole for murderers.

4 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these  
5 findings and recommendations are submitted to the United States  
6 District Judge assigned to this case. Within 20 days after being  
7 served with these findings and recommendations, respondent may  
8 file written objections. The document should be captioned  
9 "Objections to Magistrate Judge's Findings and Recommendations."  
10 The district judge may accept, reject, or modify these findings  
11 and recommendations in whole or in part.

12 Dated: DEC 21 2004

  
13  
14 Peter A. Nowinski  
15 Magistrate Judge  
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(C.C.P. §§1013A, 2015.5)

STATE OF CALIFORNIA )  
 ) SS. In re: Peter Hernandez, on habeas corpus  
COUNTY OF MONTEREY )

I, WILLIAM WALKER, am a resident of the State of California,  
County of Monterey. I am over the age of 18 years and I ~~am~~ am not a party to the within action.  
My business/residence address is P.O. Box 689, Soledad, California, 93960-0689.

On January 21, 2007, I served the foregoing:

PETITION FOR WRIT OF HABEAS CORPUS WITH POINTS

AND AUTHORITIES, EXHIBITS IN SUPPORT THEREOF

on the parties listed below by placing a true copy thereof enclosed in a sealed envelope with postage  
fully prepaid in the United States mail at Soledad, California, addressed as follows:

California Attorney General  
P.O. Box 944255  
Sacramento, CA 94244-2550

There is regular delivery service by the U.S. Postal Service between the place of mailing  
and the places so addressed.

I declare under the penalty of perjury under the laws of the State of California that the  
foregoing is true and correct.

Executed this 21<sup>st</sup> day of January, 2007, at

Soledad, California.

COPY

/s/ William Walker

**EXHIBIT B**

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DEPT 100

Date: SEPTEMBER 24, 2007

Honorable: PETER ESPINOZA

Judge JOSEPH M. PULIDO

Deputy Clerk

NONE

Bailiff NONE

Reporter

(Parties and Counsel checked if present)

BH004508

In re,  
 PETER HERNANDEZ,  
 Petitioner,  
 On Habeas Corpus

Counsel for Petitioner:

Counsel for Respondent:

Nature of Proceedings: ORDER RE: WRIT OF HABEAS CORPUS

The Court has read and considered the Petition for Writ of Habeas Corpus filed by Petitioner on February 23, 2007 challenging a July 13, 2006 determination by the Board of Prison Terms (hereafter "Board") that Petitioner is not suitable for parole. Having independently reviewed the record, giving deference to the broad discretion of the Board in parole matters, the Court concludes that the record contains "some evidence" to support a finding that petitioner would pose an unreasonable risk of danger to society and is unsuitable for parole (*See* Cal. Code Reg. Tit. 15, §2281; *In re Rosenkrantz* (2002) 29 Cal.4<sup>th</sup> 616, 667).

Petitioner was received in the Department of Corrections on March 23, 1979 after a conviction for first degree murder and assault with intent to commit murder. Petitioner was sentenced to 7 years to life. His minimum parole eligibility date was September 3, 1985.

The record reflects that the commitment offense occurred on April 25, 1977 when Petitioner and his crime partner approached the three victims in a residential area of Los Angeles. Following a brief conversation, Petitioner pulled a gun from his coat and fired a shot at the victim at point blank range, killing him. The two remaining victims ran from the scene but were pursued by Petitioner who continued firing, striking both men in the leg as his crime partner yelled "Get them, Get them." After emptying the weapon, Petitioner returned with his crime partner to their vehicle and fled the scene.

Petitioner was later identified by his wounded victims. The record indicates that subsequent investigation revealed that Petitioner had attempted to purchase marijuana and, when advised that the victims had none, opened fire. Petitioner maintained his innocence until his appeals were exhausted after which time he admitted his guilt.

At his parole consideration hearing, Petitioner admitted that he had committed the crime and related the following details. The crime occurred while Petitioner was seeking to retrieve items that were previously stolen from his sister's house in a burglary. Petitioner's crime partner had identified someone who might be in possession of the stolen items. Petitioner unsuccessfully attempted to see this person but was rebuffed by another who pulled a weapon and told him to leave. Petitioner did so but upon the suggestion of his crime partner obtained a gun and returned to the neighborhood to try to retrieve the property. During a discussion with the victim on a sidewalk, the victim denied having any of the property and approached Petitioner with his

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NONE

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BH004508

In re,  
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Petitioner,  
On Habeas Corpus

Counsel for Petitioner:

Counsel for Respondent:

hand in his pocket. Petitioner pulled the gun from his pocket, fatally shot the decedent once in the chest and turned to shoot at the decedent's two companions, firing until the gun was empty.

The Board found Petitioner unsuitable for Parole, noting "we come to this conclusion by the commitment offense that was committed in a special callous manner." The Board noted that multiple victims were involved and cited the motive for the crime as a factor supporting its determination. The Board noted Petitioner's prior conviction for auto theft and a failure to avoid subsequent criminal conduct after probation. The Board noted Petitioner's institutional disciplinary history, including four CDC 115s, three of which were for fighting or mutual combat. The Board also considered Petitioner's positive 2004 psychological report, his extensive vocational training and other achievements. The Board also found Petitioner's parole plans to be unrealistic. The Board decision stated that "there is virtually no employment plan . . . , [a]nd your residential plans of sharing a two-bedroom residence with two adults and three . . . children seems suspect."

The Board's discretion in analyzing factors to determine whether the Petitioner "will be able to live in society without committing additional antisocial acts" is "almost unlimited." *In re Rosenkrantz, supra*, 29 Cal. 4<sup>th</sup> at 655. "[T]he court may inquire only whether *some evidence* in the record before the Board supports the decision to deny parole based upon the factors specified by statute and regulation." *In re Rosenkrantz, supra*, 29 Cal. 4<sup>th</sup> at 658. "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the [Board]. . . ." *In re Rosenkrantz, supra*, 29 Cal. 4<sup>th</sup> at 677.

In reaching its decision, the Board considered and weighed the factors bearing on Petitioner's suitability for parole, primarily basing its determination on the circumstances of the commitment offense. The commitment offense alone may be a circumstance tending to establish an inmate's unsuitability if the circumstances are beyond the minimum necessary to sustain a conviction for that offense. (*Rosenkrantz, supra*, 29 Cal. 4<sup>th</sup> 616, 683.). Such circumstances were found by the Board in the fact that multiple victims were attacked or injured. There is "some evidence" to support this finding, as Petitioner shot and killed one victim, then turned to the other two victims, shooting each in the leg while emptying his gun. One of the circumstances tending to indicate unsuitability for parole is that the offense was committed in an especially heinous, atrocious or cruel manner. (*Rosenkrantz, supra*, 29 Cal. 4<sup>th</sup> 616, 683.); Cal. Code Reg. Tit. 15, §2281(c)(1). The fact that multiple victims were attacked is a factor upon which the Board may properly rely in finding the commitment offense to be determinative of Petitioner's unsuitability for parole. Cal. Code Reg. Tit. 15, §2281(c)(1)(A).

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

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NONEJudge JOSEPH M. PULIDO  
Bailiff NONEDeputy Clerk  
Reporter

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Counsel for Petitioner:

Counsel for Respondent:

Applying the extremely deferential standard required by *Rosenkrantz*, the court does not reweigh the relevant factors to determine whether the weight of the evidence supports a grant of parole. *See In re Jacobson*, No. BH003835 (August 28, 2007) Second Appellate District), slip op. at 18. Because there is "some evidence" to support the Board's determination, the petition is denied.

The court order is signed and filed this date. The clerk is directed to give notice.

A true copy of this minute order is sent via U.S. Mail to the following parties:

Peter Hernandez  
C-03015  
Correctional Training Facility  
P.O. Box 689  
Soledad, California 93960-0689

State of California- Department of Justice  
Office of the Attorney General  
110 West A Street, Suite 1100  
P.O. Box 85266  
San Diego, California 92186-5266  
Attn: Ms. Cynthia Lumely

**EXHIBIT C**

MC-275

Name Peter Hernandez  
 Address P.O. Box 689/F-237-L  
Correctional Training Facility  
Soledad, CA 93960-0689  
 CDC or ID Number C-03015

COURT OF APPEAL - SECOND DIST.

**FILED**

OCT 15 2007

JOSEPH A. LAITE

Clerk

D. SANDERS

Deputy Clerk

SECOND DISTRICT COURT OF APPEALS

(Court)

## PETITION FOR WRIT OF HABEAS CORPUS

**B202757**

No. \_\_\_\_\_

(To be supplied by the Clerk of the Court)

<b>PETER HERNANDEZ,</b> Petitioner vs. <b>B. CURRY, Warden, et al.,</b> Respondent
--

**INSTRUCTIONS—READ CAREFULLY**

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Page one of six

This petition concerns:

☐ A conviction

☒ Parole

☐ A sentence

☐ Credits

☐ Jail or prison conditions

☐ Prison discipline

☒ Other (specify): state and federal denial of due process and equal protection

1. Your name: Peter Hernandez
2. Where are you incarcerated? Correctional Training Facility, Soledad, CA 93960
3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

Homicide of the first degree, Assault w/intent to commit murder, firearm use

- b. Penal or other code sections: §§ 187, 217, 12022.5, 1203.06(a)(1) [under P.C. §1168]

- c. Name and location of sentencing or committing court: L.A. County Superior Court,  
111 N. Hill St., Los Angeles, CA 90012-3014

- d. Case number: A-334928

- e. Date convicted or committed: Mar. 9, 1979

- f. Date sentenced: Mar. 15, 1979

- g. Length of sentence: Seven (7) years to Life

- h. When do you expect to be released? Unknown, M.E.P.D.: 9-3-1985

- i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:

Mr. Kenneth Cotton, L.A. County Public Defender,

4. What was the LAST plea you entered? (check one)

☒ Not guilty ☐ Guilty ☐ Nolo Contendere ☐ Other: \_\_\_\_\_

5. If you pleaded not guilty, what kind of trial did you have?

☒ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

## 6. GROUNDS FOR RELIEF

- Ground 1:** State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

PETITIONER'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS  
AND EQUAL PROTECTION WERE VIOLATED BY RESPONDENTS WHEN THEY DENIED  
TO HIM THE INDIVIDUALIZED CONSIDERATIONS MANDATED AND REQUIRED BY  
STATUTORY AUTHORITIES AND ALL THE CLEARLY ESTABLISHED FEDERAL LAWS

## a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who did exactly what to violate your rights at what time (when) or place (where).* (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

In August of 1988 and again in January of 1990, Peter Hernandez,  
(Petitioner), was found suitable for parole. Those Grants were sub-  
sequently reversed and are attached as Exhibit "A".

On July 13, 2006, Petitioner appeared before the Board of Parole  
Hearings (BPH) for his 13th subsequent hearing (14th overall), during  
which Mr. J. Davis was Presiding Commissioner and Mr. D. Smith was  
Deputy Commissioner. A copy of the Hearing transcript is attached  
hereto as Exhibit "B", and incorporated by reference to bolster a  
claim of a "no parole" policy and/or practice which has been found  
to be patently unconstitutional by numerous state and federal courts.

Petitioner was represented by Ms. K. Rutledge. A staff psy-  
chologist, Dr. E.W. Hewchuk, Ph.D., testified utilizing a filed Report  
dated: 7-23-04, that in his opinion Petitioner is NOT a risk of CURRENT  
(continued on attached pages)

## b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

(SEE ATTACHED POINTS AND AUTHORITIES)

(continued from previous page):

danger to the public safety. A copy of that Report and Reports from 2004, 2002, 1999 and 1997 are attached as Exhibit "C". A copy of the 2006 Correctional Counselor Level I report was prepared and filed but not cited to and is attached hereto as Exhibit "D".

Copies of the 2005 and 2003 Decisions denying parole are attached as Exhibit "E" and are clearly anecdotal evidence to further advance the allegation of a "no parole" policy and/or practice that has been held to be unconstitutional as well as illegal by all courts that have ruled on the subject matter. With the Court's leave, Petitioner respectfully requests that this anecdotal evidence be incorporated to this pleading.

Also present at the hearing was Mr. P. Turley, deputy district attorney for Los Angeles county, parole division.

California's parole statutes and regulations bestow on life prisoners a liberty interest in parole protected by due process. McQuillen v. Duncan (9<sup>th</sup> Cir. 2002) 306 F.3d 895, 901-903; In re Rosenkrantz<sup>1</sup> (2002) 29 Cal.4<sup>th</sup> 616, 661 [Rosenkrantz V]. Petitioner's liberty interest required the BPH panel to find him suitable for parole and set his prison term and a parole date because, when his MEPD lapsed, his parole was evaluated to no longer pose an unreasonable risk of danger to society or public safety. (Penal Code (PC) §3041(a); 15 California Code of Regulations (CCR) §§ 2280, 2281(a).)

In some cases, a lifer who otherwise qualifies for parole may be found unsuitable for and denied parole if the commitment offense was especially egregious when compared to other instances of the same offense. Such cases, however, are *exceptions*, not per the rule. Accordingly, the conduct of a to-life sentenced inmate who committed first degree murder **must** be especially violent when compared to that of other first-degree murderers for parole to be denied on the basis of the offense in the case of an otherwise qualified inmate. However, the offense cannot serve as a basis for denying parole interminably. In re Ramirez (2001) 94 Cal.App.4<sup>th</sup> 549, 569-570; Rosenkrantz II, 658; (cf. Biggs v. Terhune (9<sup>th</sup> Cir. 2003) 34

<sup>1</sup> There have seven (7) "Rosenkrantz" decisions: People v. Rosenkrantz (1988) 198 Cal.App.3d 1187; In re Rosenkrantz (2000) 80 Cal.App.4<sup>th</sup> 409; Davis v. Superior Court (2-22-01, B146421 [non-pub.]); In re Rosenkrantz (2002) 95 Cal.App.4<sup>th</sup> 358; In re Rosenkrantz (2002) 29 Cal.4<sup>th</sup> 616; In re Rosenkrantz L.A. County Sup.Ct. no. BH003529, filed 6-26-2006; Rosenkrantz v. Marshall (2006) 444 F.Supp.2d 1063.

1 F.3d 910); Irons v. Warden (E.D. Cal. 2005) 358 F.Supp.2d 936; Martin v. Marshall (N.D. Cal. 2006) 431  
 2 F.Supp.2d 1038 (Martin I); In re Rosenkrantz (C.D. Cal. 2006) 444 F.Supp.2d 1063, 1081 [Rosenkrantz VII].

3 Substantive due process requires that the grounds set forth by a BPH panel for its decision must be  
 4 supported by at least some credible, relevant evidence in the record. The panel was required to base its  
 5 findings on a weighing of all relevant, reliable evidence. (15 CCR § 2281(b); In re Minnis (1972) 7 Cal.3d  
 6 639, 646; In re Rosenkrantz (2000) 80 Cal.App.4<sup>th</sup> 409, 424-427 (Rosenkrantz I); Rosenkrantz II, 655;  
 7 Ramirez, supra, 566. The "some evidence" standard is satisfied if there is reliable evidence in the record that  
 8 could support the conclusion reached. Powell v. Gomez (9<sup>th</sup> Cir. 1994) 33 F.3d 39, 40; Cato v. Rushen (9<sup>th</sup>  
 9 Cir. 1987) 824 F.2d 703, 705. And federal due process requires *substantial* evidence having indicia of  
 10 reliability Jancsek v. Oregon Bd. Of Parole (9<sup>th</sup> Cir. 1987) 833 F.2d 1389, 1390; In re Powell (1988) 45  
 11 Cal.3d 894, 904; In re Rosenkrantz II, 658; McQuillen, supra, 306; Biggs, supra, 915; Caswell v. Calderon  
 12 (9<sup>th</sup> Cir.2004) 363 F.3d 832, 839.

13 Black's Law Dictionary 5<sup>th</sup> Ed. 1979 defines SUBSTANTIAL EVIDENCE as follows: "Such  
 14 evidence that a reasonable mind might accept as adequate to support a conclusion. *It is that*  
 15 *quality of evidence necessary for a court to affirm a decision of an administrative board.*  
 (Black's p. 1281, citing State v. Green (1974) 544 P. 2d 356, 362. Emphasis added.)

16 The Due Process clause of the Fourteenth Amendment prohibits state action that deprives a  
 17 person of life, liberty, or property without due process of law. A person alleging a due process violation  
 18 must first demonstrate that he or she was deprived of a liberty or property interest protected by the Due  
 19 Process Clause, and then show that the procedures that led to the deprivation were constitutionally  
 20 insufficient. Kentucky Dept. of Corrections v. Thompson (1989) 490 U.S. 454; McQuillen, supra, 900.

21 In the parole context, a prisoner alleging a due process claim must demonstrate the existence of a  
 22 protected liberty interest in parole, and the denial of one or more of the procedural protections that must be  
 23 afforded when a prisoner has a liberty interest in parole. The Supreme Court held in 1979, and reiterated in  
 24 1987, that "a state's statutory scheme, if it uses mandatory language, creates a presumption that parole  
 25 release will be granted when or unless certain designated findings are made, and thereby gives rise to a  
 26 constitutional liberty interest." McQuillen, supra, 901 (citing Greenholtz v. Nebraska Penal Inmates (1979)  
 27 442 U.S. 1, 7 and Board of Pardons v. Allen (1987) 482 U.S. 369, 373. Because no evidence supported the  
 28 panel member's finding that Petitioner's parole poses an "unreasonable risk of danger to society" or to

1 "public safety," and the finding was inapposite to the record, parole denial on that basis subverted due  
2 process.

3 The reason stated by the panel for finding Petitioner unsuitable was BPH's boilerplate statement that  
4 his parole "would pose an unreasonable risk of danger to society or a threat to public safety." (Exhibit "A", p.  
5 70,) the sole ground set forth by the panel in support of its Decision to AGAIN, for at least the fourteenth  
6 (14<sup>th</sup>) time, deny suitability and dismiss his warrant of parole which is tremendously long overdue!

7 (His M.E.P.D. was on the 9<sup>th</sup> of September, 1985!!)

8 Parole denial based on the "unreasonable risk" subterfuge abandoned principles of independence  
9 and abrogated due process because it is supported by **NO EVIDENCE** whatsoever. **All** of the competent,  
10 professionally-sanctioned evidence that addresses Petitioner's current **and** future dangerousness, parole  
11 risk, etc., found it to be "low," "below average," or "no more than the average citizen," nor has it been for over  
12 a score years. (See Exhibit "C", throughout, Exhibit "A", at pp. 45-46.)

13 Utilizing the legal precedent established as the focal criteria, all relevant, reliable evidence in  
14 Petitioner's records that addresses his dangerousness and parole "risk" all assess these factors to be low,  
15 and because not a scintilla of reliable, relevant evidence supports the panel's flawed findings, the sole  
16 relevant reason for finding him unsuitable for parole sensibly suggests this was an illegitimate (ongoing)  
17 basis for denial. Martin v. Marshall (N.D. Cal. 2006) 448 F.Supp.2d 1143, (Martin II), et al.

18 In Martin, supra, Justice Patel found NO justification for the panel's boilerplate lack of individual  
19 consideration and in her July 21, 2006 Memorandum and Order she stated:

20 "In light of the Board's apparent abandonment of its independent role

21 —**which occurred AFTER Governor Schwarzenegger took office,**

22 *the court finds that a remand would indeed be futile.*" There can be no question but that the  
23 implication here is exactly what it means: NO INDEPENDENT PAROLE DECISION BY THE WILSON,  
24 DAVIS, OR SCHWARZENEGGER regimes for this Petitioner. *Id.* at p. 1144. (Emphasis added.)

25 In Rosenkrantz II, supra, at p. 655, the Supreme Court explained that parole release decisions  
26 "entail the [BPH]'s attempt to predict by subjective analysis whether the inmate will be able to live in society  
27 without committing additional antisocial acts."

28 Such a prediction requires analysis of individualized factors on a case-by-case basis and the BPH's

1 discretion in that regard is almost but NOT unlimited. Further, regardless of the tenet that the BPH's  
2 discretion is exceedingly broad, it is circumscribed by the requirements of procedural due process.  
3 (Rosenkrantz, id., Calif. Const. article I, § 7(a), and statutory directives.)

4 Absent reliable evidence of the presence of unsuitability factors, there must be some relevant,  
5 reliable evidence that a petitioner is otherwise unsuitable for parole, such as by his having failed to meet the  
6 suitability criteria under 15 CCR § 2402, subd. (d); §§ 1-4, 6-9. And, while the BPH has exceedingly broad  
7 discretion in its parole decisions, the Findings must reflect "*an individualized consideration of the specified*  
8 *criteria and cannot be arbitrary or capricious.*" Rosenkrantz V., *supra*, 677; "[t]he liberty interest is created,  
9 not upon the grant of a parole date, but upon the incarceration of the inmate." Biggs, *supra*, p. 914.

10 The failure to properly consider the post-incarceration factors highlights the inherent  
11 misunderstanding and application of the "some evidence" standard and triggers the required scope of  
12 judicial review of the federal questions presented here.

13 There are two sets of parole criteria regulations, not one. 15 CCR §§ 2402, subd. (c) [Circumstances  
14 Tending To Show Unsuitability], and 2402 subd. (d) [Circumstances Tending To Show Suitability]. It appears  
15 that the BPH's focused emphasis has been on, and remains on, subdivision (c), with little or no regard given  
16 to subdivision (d). Petitioner asserts, as a matter of statutory construction, the "public safety" concern in PC  
17 § 3041(b), demands an equal (or neutral) emphasis at the outset of a panel's deliberations AND on its  
18 Findings under both sets of criteria and any balanced and reasonable interpretation should compel this  
19 approach throughout the entire process due any inmate and to do so would virtually assure a Finding of  
20 suitability.

21 Factors TENDING to show suitability or unsuitability must be weighed and balanced within the  
22 parameters of a standard of proof. Without this critical, reliable component, the process is inherently  
23 arbitrary, capricious, and defective. This standardless analysis would vitiate the individualized consideration  
24 held appropriate in Rosenkrantz II. The crux of the matter is that of a standard of proof with indicia of  
25 reliability as set forth below and reinforced with significant legal precedent.

26 The "some evidence" standard is NOT the sole standard of evidence to be applied to the BPH's  
27 decisions. It is only one aspect of *judicial* review employed by a habeas court. Edwards v. Balisok (1997)  
28 520 U.S. 640, 647. And, if the Rosenkrantz II decision implies, as it does, that the "some evidence" standard

1 should be applied to the BPH Findings, then this is a clear and unreasonable application of well-established  
2 federal Constitutional law set forth by the High Court. Nothing in Superintendent v. Hill (1985) (Hill) 472 U.S.  
3 445, 456, implies that it IS A STANDARD OF EVIDENCE to be applied by any agency, board, or executive  
4 body outside a disciplinary committee within an exigent-circumstances prison setting that has no pressing  
5 need for more formal evidentiary standards or anything warranting standardless precedents

6 What IS implied by the Rosenkrantz II court, when it held that a habeas court can't reverse a  
7 decision denying parole even if it determines that the evidence overwhelmingly preponderates towards a  
8 finding of suitability is completely unreasonable because it prevents effective habeas relief from an arbitrary  
9 and capricious decision, and worse, stymies effective judicial review. This court is not obliged nor compelled  
10 to defer to a state decision misapplying federal constitutional principles. Hubbart v. Knapp (9<sup>th</sup> Cir. 2004) 379  
11 F.3d 773, 780; referencing Mullaney v. Wilbur 421 U.S. 684, 691; see also Peltier v. Wright (9<sup>th</sup> Cir. 1994) 15  
12 F.3d 860, 862.

13 In Oxborrow v. Eikenberry (9<sup>th</sup> Cir. 1989) 877 F.2d 1395, 1399, the Circuit held that: "Our deference  
14 to the [state court] is suspended only upon a finding that the court's interpretation of [state law] is untenable  
15 or amounts to a subterfuge to avoid federal review of a constitutional violation." Thus, it is petitioner's  
16 contention that respondents seek to avoid federal review by asserting that the "some evidence" standard 1)  
17 is applied by the BPH and/or, 2) limits judicial review ONLY to the BPH's ultimate decision and not to a  
18 finding of a defective pre-Decision process.

19 If Petitioner were the beneficiary of an individualized consideration utilizing real evidence with  
20 reliable, articulable proof, it would have logically flowed that he is now MORE suitable than his previous  
21 hearings wherein he was found suitable. (Exhibit "A"). All those laudatory words at his Hearing would have  
22 had a consistent ring of truth to them in that he has progressed towards a more-suitable mien, not the  
23 reverse. This highly illegal "boilerplate" denial now rises to the level of a federal due process violation. Biggs,  
24 supra, 916-917; Martin, supra, 1046-1048.

25 The High Court in Greenholtz (at p. 7) Allen (at p. 373) , supra, established that:

26 "While there is no constitutional or inherent right of a convicted person to be conditionally  
27 released before the expiration of a valid sentence, a state's statutory scheme, if it uses  
28 mandatory language, creates a presumption that parole release will be granted when or  
unless certain designated findings are made, and thereby gives rise to a constitutional  
liberty interest." (citing McQuillen, supra, at 901.)

1 In the absence of any evidence in the record supporting the BPH's decision, remanding the case  
 2 back to be reheard is a futile act, and the appropriate remedy is release of the Petitioner. McQuillen II,  
 3 supra, p. 1015-15; Martin II, supra, 1144-45; Rosenkrantz VII, supra, 1087.

4 A petitioner is entitled to "something more than mere pro forma consideration.", e.g. meaningful  
 5 individual consideration. Not a sham hearing using rote words and repeating boilerplate from a pre-printed  
 6 form. The only mandate "normally" being followed under P.C. § 3041 (a), is a multi-year denial under § 3041  
 7 (b) to "swallow" the due process required under the 14<sup>th</sup> Amendment, an ingestion violating the equal  
 8 protection guarantees and abridges Petitioner's civil rights under both state and federal Constitution's  
 9 proscription against this tactic for all similarly-situated inmates. In re Sturm (1974) 11 Cal.3d 258, 268;  
 10 Ramirez, supra, at 570; Rosenkrantz V, at pp. 658, 683:

11 "Judicial oversight must be extensive enough to protect the limited right of parole applicants  
 12 "to be free from an arbitrary parole decision ... and to something more than mere pro forma  
 13 consideration." [citation omitted] The courts may properly determine whether the [BPH]'s  
 14 handling of parole applications is consistent with the parole policies established by the  
 15 Legislature. [ ] while courts must give great weight to the [BPH]'s interpretation of the parole  
 16 statutes and regulations, final responsibility for interpreting the law rests with the courts. [ ]  
 17 Courts must not second-guess the [BPH]'s evidentiary findings [ ] However, it is the proper  
 18 function of judicial review to ensure that the [BPH] has honored in a "practical sense" the  
 19 applicant's right to "due consideration." [ ] Ramirez supra, at 564.

20 Since it is clear that parole should be the rule and not the exception, a moderate or average risk  
 21 cannot be construed as "unreasonable." Were an average risk grounds for parole denial, then the exception  
 22 would "operate so as to swallow the rule that parole is 'normally' to be granted.

23 "All violent crime demonstrates the perpetrator's potential for posing a grave risk to public  
 24 safety ... {However} the [BPH] "shall normally set a release date." [citation omitted] The  
 25 [BPH]'s authority to make an exception ... should not operate to swallow the rule that parole  
 26 is 'normally' to be granted. ... Therefore, a life term offense must be *particularly egregious* to  
 27 justify the denial of a parole date. In order to comply with the parole policy established by  
 28 the Legislature in P.C. § 3041, the [BPH] must weigh the inmate's criminal conduct not  
 against ordinary social norms, but against other instances of the same crime or crimes."  
 (Ramirez, supra, at 570, disapproved on other grounds, Emphasis added as usual in  
 published cases.)

24 The applicability of this standard to the review of decisions applies and Petitioner's right to  
 25 due consideration does not appear to have been honored in any practical sense by the panel in this case  
 26 and their Decision is facially and legally deficient. In the instant case the BPH made no effort to comply with  
 27 the controlling rules and seems to have merely stated its "predetermined conclusion." (See: In re Caswell

1 (2001) 94 Cal.App.4th 1017, 1030.)

2 In In re Smith (2003) (Smith II) 114 Cal.App.4<sup>th</sup> 343, 369, the Sixth District Court of Appeals found  
3 that there was not some evidence that Smith's crime was more callous than the average for this type of  
4 crime. There was nothing to "distinguish th[e] crime from other [serious] murders [involving a gun] ... the  
5 record provides no reasonable grounds to reject, or even challenge, the findings and conclusions of the  
6 psychologist and counselor[s] concerning [his] dangerousness."

7 Surely the same must appear to be true here. (See Exhibits "C" and 2004 Correctional Counselor's  
8 Report, Exhibit "F", attached.) The Second District Court of Appeals, in the case of another life-term inmate  
9 named Smith similarly found no evidence to support a parole denial based on the commitment offense. In re  
10 Smith (2003) (Smith I) 109 Cal.App.4<sup>th</sup> 489.

11 Compare In re Scott (2004) 119 Cal.App.4<sup>th</sup> 871, 876-877 [Scott I], where the First District reversed  
12 the BPH's standard statement of reliance on the gravity of the crime because in truth, "the relevant evidence  
13 show[ed] no more callous disregard for human suffering than is shown by most [ ] murder offenses.  
14 (Governor's rescission of Scott's parole unanimously reversed on 10-18-05, see: In re Scott 133 Cal.App.4<sup>th</sup>  
15 538, Scott II.)

16 On 5-18-05, in Coleman v. BPT (E.D. Cal. No. 97-0783), Honorable Judge L. Karlton  
17 adopted the Findings and Recommendations IN FULL. There, it was found that ex-governors Davis and  
18 Wilson (and NOW Governor Schwarzenegger, too. See *infra* at p. C), had/have panels with a sub rosa "no  
19 parole" policy and were/are carrying it out. Martin I *supra*, 1048-49, Martin II, *supra*, 1144; see Coleman and  
20 Final Order, attached as Exhibit "G".

21 It is beyond debate that neither a state agency interpreting an enabling statute nor any court of the  
22 state can construe a statute contrary to Legislative intent or the ordinary meaning of the words used in a  
23 statute. Our Court, in the entire history of the statute, has never construed it with any adequacy according to  
24 the plain meaning to create guidance and instill compliance by both the BPH panels and those who serve  
25 the governors otherwise.

26 Instead, this lack of judicial construction has led to the many years of overwhelming denials that DO  
27 NOT reflect in any clear way the presumptions of § 3041. Nor does it reflect instruction as to what the  
28 agency's burden of proof is or the legal significance of relevant, reliable, or material evidence. This lack of

judicial guidance has left unfettered discretion in the hands of lay appointees to determine the legal import of evidence (or lack thereof) although these persons are arguably unqualified by a dearth of professional standing to make these determinations upon which a federal liberty interest depends.

Determining the legality and weight and of evidence requires some specific legal training in evidentiary law; not by lay persons, and which lack of training is visibly evident in the incongruously inapposite findings thus made. (McQuillen I, supra, 907-912; Rosenkrantz II, supra, 680; Rosenkrantz I, supra, 424-426; Smith II, supra, 361; Smith I, supra, 501-506.) These are only a few of the published cases but unpublished absurdities exponentially abound!

The Sixth district held for the proposition in Smith II at 361 that "[t]he weight given the specified factors relevant to parole suitability lies within the discretion of the BP[H]."; a court's determination "of whether the *preponderance of the evidence* supports a finding of suitability is irrelevant." (Emphasis added.) This is the first time a published decision on the BPH has even mentioned a burden of proof. This reference infers the BPH must honor this evidentiary standard as faithfully to the letter as legally possible.

Yet there is no settled bright line rule for a court to determine if the BPH has met that standard. Just the opposite, in fact, since Smith II strongly suggests that even if a reviewing court finds the agency did not meet the standard, an allegation of "some evidence" is sufficient to automatically require judicial deference.

The Third District Court of Appeals stated the following as fact:

"It is without doubt that a blanket no-parole policy would be contrary to the law, which contemplates that persons convicted of murder without special circumstances may eventually become suitable for parole and that, when eligible, they should be considered on an individualized basis. Thus, blanket policies have long been deemed to be improper. ¶ In Roberts v. Duffy (1914) 167 Cal. 629, a decision that predates the enactment of our state's old indeterminate sentencing law, the Court condemned a blanket parole policy that was contrary to the statutory parole scheme then in place. It appeared that the statutory law *allowed a prisoner to apply for parole after serving ONE YEAR* but that, **contrary to the statute, the parole authority adopted a rule precluding application until one-half the sentence was served.**

The Court held that, "while the prisoner had no right to apply to release on parole at any time, **he was entitled to apply** and have his application duly considered on an individualized basis." *Id.* at 640-641.

(Does this sound familiar? Emphasis added to original citation.)

"With respect to persons sentenced to indeterminate terms, the purpose of punishment is satisfied by the requirement of service of a minimum period before eligibility for parole and, when suitable for parole, by determination of a release date **in a manner that will provide**

1 UNIFORM TERMS for offenses of similar gravity and magnitude with respect to their threat to  
2 the public." (P.C. §§ 3041, 3041(a), 3041.5, citing In re Morral (2002) 102 Cal.App.4<sup>th</sup> 280,  
291-292.)

3 The arbitrary or capricious misapplication of statutory law violates both state and federal due  
4 process. Hill, supra, at p. 428; Gordon v. Duran (9<sup>th</sup> Cir. 1990) 895 F.2d 610, 613; In re Edsel P. (1985) 165  
5 Cal.App.3d 763, 779. "The touchstone of due process is protection of the individual against [the] arbitrary  
6 action of government." Wolff v. McDonnell (1974) 418 U.S. 539, 558.)

7 These principles apply in equal force to incarcerated prisoners. (In re Jones (1962) 57 Cal.2d 860,  
8 862; ["a convicted felon, although civilly dead, is nevertheless a 'person' entitled to protection of the 14<sup>th</sup>  
9 Amendment."]; In re Price (1979) 24 Cal.3d 448, 453 [acknowledging that P.C. § 2600 limits a prisoner's  
10 deprivation to only such rights "as is necessary in order to provide for the reasonable security of the  
11 institution in which he is confined."].)

12 In interpreting a prisoner's rights of substantive due process the High Court has held that a prisoner  
13 may derive a due process liberty interest from administrative regulations, as well as state law and the U.S.  
14 Constitution. Sandin v. Conner (1995) 515 U.S. 472, 484; Hewitt v. Helms 459 U.S. 460, 469, receded from  
15 on p. 484, fn. 5; Meachum v. Fano (1976) 427 U.S. 215, 226; Wolff, supra, at p. 557. In applying these  
16 standards here, the BPH violated Petitioner's right to constitutional due process but he is not challenging the  
17 BPH's right to conduct professional psychological assessments as the main focus of the parole evaluation  
18 process, but does challenge their "normal" practice of summarily dismissing and patently ignoring their own  
19 experts.

20 Predictions of future conduct necessarily relate to public safety concerns but Judge Karlton in Irons  
21 v. Warden (E.D. Cal. 2004) 358 F.Supp.2d 936 (9<sup>th</sup> Cir. Review pending, filed on 5-18-05, No. 05-15275),  
22 discussed this conundrum and noted that the propensity analysis thusly:

23 "To a point, it is true, the circumstances of the crime and motivation for it may indicate a  
24 petitioner's instability, cruelty, impulsiveness, violent tendencies and the like. However,  
25 after 15 or so years in the cauldron of prison life, not exactly an ideal therapeutic  
26 environment to say the least, and after repeated demonstrations that despite recognized  
27 hardships of prison, [petitioner] does not possess these attributes, the predictive ability of  
28 the circumstances of the crime is near zero."<sup>2</sup>

<sup>2</sup> "It is worth noting, as has our [Calif.] Supreme Court (People v. Murtishaw (1981) 29 Cal.3d 733, 768, disapproved on other grounds in People v. Boyd (1985) 38 Cal.3d 762., that a large number of legal and scientific authorities believe that, even where the passage of time is not a factor and the assessment is made by an expert, predictions of future dangerousness are exceedingly unreliable. (See, e.g., Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 Wash. & Lee L. Rev. 901 (2000); Otto, *On the Ability of Mental Health Professionals to 'Predict Dangerousness'*, 18 Law & Psychol. Rev. 43 (1994); Lidz, et al., *The Accuracy of Predictions of Violence to Others*, 269, Jour.Am.Med.Assn. 1007 (1993); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 Pa.L.Rev. 439 (1974); Dershowitz, *The Law of Dangerousness: Some Fictions About*

(Irons, supra, at p. 947, fn. 2, this 'dicta' was also cited as Headnote #10 at p. 937; see additional discussion of "need for more therapy" used as a ruse to deny suitability at p. 948.)

P.C. § 3041(a) governs parole suitability determination processes and does not define more than one class of persons. The statute generalizes that its focus is "any prisoner" who is serving an indeterminate term. Through application, however, the agency's discrimination amongst the class serving indeterminate sentences is in violation of the right to equal protection ensconced in the Fourteenth Amendment. Equal protection is "[in essence] a direction that [a person] similarly situated should be treated alike." (City of Cleburne v. Cleburne Living Ctr. (1985) 473 U.S. 432, 439, citing Plyler v. Doe (1982) 457 U.S. 202, 216, "To state a claim ... for violation of the Equal Protection Clause of the 14<sup>th</sup> Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." Barren v. Harrington (9<sup>th</sup> Cir. 1998) 152 F.3d 1193, 1194, cert. denied 525 U.S. 1154 (1999).)

Strict scrutiny, alternatively, is utilized if the government distributes benefits or burdens in a manner inconsistent with fundamental rights. (See Sosna v. Iowa (1975) 419 U.S. 393; Shapiro v. Thompson (1969) 394 U.S. 618.) The fundamental right here is the due process right to relevant, reliable evidence being considered when analyzing a right to release on parole. McQuillen I, supra, at 900; McQuillen II, supra, at 1012; Martin I, supra, at 1043: ("[T]he deferential 'some evidence' standard has outer limits. [citing Coleman, supra, with approval slip op. at 9] If it is established that a particular judgment was predetermined, then a prisoner's due process rights will have been violated even if there is 'some evidence' to support the decision. [See Bakalis v. Golembeski (7<sup>th</sup> Cir. 1994) 35 F.3d 318, 326] (a decision-making "body that has prejudged the outcome cannot render a decision that comports with due process. ... The California Supreme Court has explicitly stated that a blanket no-parole policy as to a certain category of prisoners is illegal. [In re Minnis; In re Morrall] " ... Because petitioner cannot change the past, denying [P]etitioner parole based only on the facts surrounding the crime itself effectively changes his sentence ...

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*Predictions* (1970) 23 J. Legal Ed. 24. According to a Task Force of the American Psychiatric Assn., "[n]either psychiatrists nor anyone else have demonstrated an ability to predict future violence or dangerousness. (Am.Psych.Assn., Task Force Rpt. 8, *Clinical Aspect of the Violent Individual* (1974) at p. 28.) As our [Calif.] Supreme Court has also noted, "the same studies which proved the inaccuracy of psychiatric predictions [of dangerousness] have demonstrated BEYOND DISPUTE the no less disturbing manner in which such prophecies consistently err: they predict acts of violence which will not take place ('false positives', thus branding as 'dangerous' many persons who are in reality totally harmless. [citation.]" (People v. Burnick (1975) 14 Cal.3d 306, 327.) (all emphasis in original). (See: copy of Order denying Review, dated 11/30/05, Daily Journal 12/2/05, p. 13803, attached as Exhibit "B"). Scott II, supra, footnote #9.

1 into life imprisonment without the possibility of parole." Ibid. at 1046.) (cf: Martin II, supra, at 1144: "In sum,  
2 the Board appears to have capitulated to the blanket no-parole policy described by this court in its previous  
3 [Martin I] Order, abandoning its role as an independent assessor of petitioner's eligibility. This capitulation is  
4 particularly troubling in light of the Board' vigorous assertions of independence during the 2003 hearing."  
5 This Honorable Court should grant the writ and Order all appropriate relief including a complete discharge  
6 from custody and sanction full redress for Petitioner.

7  
8  
9 CONCLUSION

10 WHEREFORE, Petitioner respectfully submits that the writ should be granted in full and all available  
11 remedies leading to his immediate release from custody be Ordered at the earliest possible moment and  
12 forthwith. It is respectfully requested that an evidentiary hearing be Ordered as an alternative to the above  
13 should there be consideration of the "no parole" policy and/or practice by this previous administration.

7. Ground 2 or Ground \_\_\_\_\_ (if applicable):

PETITIONER'S FEDERAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTIONS WERE VIOLATED WHEN RESPONDENTS UTILIZED A LESSER STANDARD OF LEGAL PROOF REQUIRING EVIDENCE WITH SOME INDICIA OF RELIABILITY TO FIND THAT PETITIONER IS UNSUITABLE TO PAROLE AND IS THEREFORE AN UNREASONABLE RISK

a. Supporting facts:

Nowhere is there any codification that avers petitioners must prove his or her suitability. Only if an inmate is found unsuitable does evidence become citable. (See Dannenberg, at 1095; Rosenkrantz at 658, 683.) Evidence must be specific, articulable, and have "some indicia of reliability." Respondents have the burden of proof to demonstrate, in the Record, why an inmate is not suitable and a denial of more than one year requires that the BPH panel state for the Record why it isn't likely that petitioners would be found suitable any time sooner. There is a wholesale vitiation going on here.

Procedural safeguards require: a hearing one year prior to the MEPD, CCR §§2268(b)[2400 et seq.], 2270(d), (e), (f); PC §3041 (a), CDC v. Morales (1995) 115 S.Ct. 1597, 1600; service and prior examination of all material considered; representation if desired.

The one-year lead on a MEPD imparts that the Legislature intended that some inmates will be suitable at an initial hearing otherwise why would such a gratuitous mandate exist? Governor's-level review presumes a neutral, well-defined, professional body that will follow all the state and federal laws. Only this practice

(continued on attached pages)

b. Supporting cases, rules, or other authority:

(SEE ATTACHED POINTS AND AUTHORITIES)

1 Ground 2, continued:

2 would meet the constitutional burden under the discretionary methods  
3 needed to quickly resolve an uncertain matter.

4 The "some evidence" relied on to deny parole must be relevant  
5 and reliable in establishing Petitioner is a current, unreasonable  
6 threat to public safety and must not be grounded in an incomplete  
7 or unreasonable assessment of the relevant factors.

8 In explaining what the "some evidence" standard meant, the  
9 Court in In re Rosenkrantz (2002) 29 Cal.4th 616 at 677, stated  
10 that "[o]nly a modicum of evidence is required." On its face, this  
11 standard could thus be seen as remarkably broad--that a scintilla  
12 of evidence (or the BPH's assessment of it)--would be enough to  
13 completely immunize BPH decisions from judicial review. However,  
14 such a reading would effectively serve to nullify the Rosenkrantz  
15 court's holding rejecting the Executive's position that factual  
16 decisions rejecting parole were immune from examination by the courts  
17 and in point of fact were required.

18 A dissection of the "some evidence" standard itself--both  
19 conceptually and through a review of the application of the  
20 Rosenkrantz' standard (and its progeny)--makes clear that this is  
21 the meaningful standard. Properly understood, it strikes an  
22 appropriate balance between judicial deference to difficult BPH  
23 decisions and the protection of constitutional liberty interests.

24 The "some evidence" standard of review is laid out here:

25 "[W]e conclude that the judicial branch is authorized  
26 to review the factual basis of a decision of the [BPH]  
27 denying parole in order to ensure that the decision comports  
28 with the requirements of due process of law, but that  
in conducting such a review, the court may inquire only  
whether some evidence in the record before the [BPH] sup-  
ports the decision to deny parole, based upon the factors

1 specified by statute and regulation. Rosenkrantz, 658.  
 2 "[a]s long as the [BPH] decision reflects due consideration  
 3 of the specified factors as applied to the INDIVIDUAL  
 4 PRISONER in accordance with applicable legal standards,  
 the court's review is limited to ascertaining whether  
 there is some evidence in the record that supports the  
 [BPH] decision." Id. at 677. (emphasis added).

5 Thus, the inquiry into whether there is "some evidence" is  
 6 more complex than it might otherwise seem, as the standard MUST  
 7 be applied within the context of the statutory framework in which  
 8 it arises. This framework imposes at least 3 requirements on the  
 9 "some evidence" standard if it is used to deny parole.

10 First, the BPH must base their decisions only on evidence that  
 11 serves to establish that the inmate will or will not pose a  
 12 continuing, "unreasonable risk of danger to society if released from  
 13 prison." CCR, title 15, §2402(a), and PC §3041(b).

14 Second, the evidentiary basis for parole decisions must be  
 15 based on the factors specified in the regulations after  
 16 individualized considerations of all of the factors. Rosenkrantz  
 17 at 677 ("The precise manner in which the specified factors relevant  
 18 to parole suitability are considered and balanced lies within the  
 19 discretion of the [executive branch], but the decision must reflect  
 20 an individualized consideration of the specified criteria and CANNOT  
 21 BE ARBITRARY AND CAPRICIOUS."); see also In re Stanley (1976) 54  
 22 Cal.App.3d 1030, 1038 n.7 ("Other courts place more weight on the  
 23 prisoner's record of crime. We abstain from any argument over the  
 24 relative primacy of various parole factors. It is enough to say  
 25 that the Adult Authority must apply all the factors.") (citing In  
 26 re Minnis (1972) 7 Cal.3d 639). These factors naturally all relate  
 27 to whether the inmate poses a continuing, unreasonable risk of danger  
 28 to society if released from prison. (emphasis added).

1 Third, the evidence upon which the BPH relies must be relevant  
2 and reliable. CCR §2402(b) ("All relevant, reliable information  
3 available to the panel shall be considered in determining suitability  
4 for parole.") (cf. CCR §§2402(d)(1-9)).

5 In sum, a court examining parole decisions must determine  
6 whether, after all consideration of all the factors enumerated in  
7 the statute and regulations, the decision was based on: 1) some  
8 evidence; 2) a reasonable consideration of all the factors specified  
9 by the statutory guidelines; 3) evidence that is both relevant and  
10 reliable; and 4) factual determinations that suggest an inmate poses  
11 a CURRENT, UNREASONABLE THREAT TO PUBLIC SAFETY.

12 A review of the post-Rosenkrantz legal panorama reveals that  
13 California courts of appeals and federal courts have routinely  
14 applied the above boundaries and checkpoints of relevance,  
15 reliability and reasonableness to the "some evidence" standard.  
16 The California Supreme Court has so far utterly failed to establish  
17 a brightline Plimsoll mark to define the full depth of the inquiry.

18 The courts continue to assess the reasonableness of the BPH's  
19 interpretation of the facts and circumstances used to legally sus-  
20 tain a finding of parole suitability denial. The court in In re  
21 Van Houten (2004) 116 Cal.App.4th 339, 356, assessed whether the  
22 BPH was reasonably able to conclude that there was some evidence  
23 of the inmate's need of continuing therapy and her dangerousness  
24 to the public. Though it found in the affirmative, the court took  
25 a close look at whether the BPH "could reasonably conclude that  
26 [her] defense, that Manson's influence overwhelmed [her], was  
27 exaggerated such that she is fully responsible for the LaBianca  
28 murders" and whether "[t]he BPH could infer with sufficient

1 reasonably to satisfy a minimal 'some evidence' standard that  
2 [she] is a danger to the public and in need of continued therapy  
3 and programming." Her denial was affirmed with instructions.

4 Judicial inquiry into the stated reasons for parole denial  
5 have their place and numerous state and federal courts--in a wide  
6 range of contexts--have similarly held the judicial inquiry into  
7 the reasonableness of BPH determinations and conclusions is  
8 appropriate, even when such determinations and conclusions are  
9 accorded broad deference. (See, e.g., In re Farley (2003) 109  
10 Cal.App.4th 1356, 1361-2: "Judicial review of a CDC custody  
11 determination is limited to determining whether the classification  
12 decision is arbitrary, capricious, irrational, or an abuse of the  
13 discretion granted those given the responsibility for operating  
14 prisons. While we must uphold respondent's classification action  
15 if it is supported by "some evidence" and we must afford great  
16 deference to an administrative agency's expertise, where the agency's  
17 interpretation of the regulation is clearly arbitrary or capricious  
18 or has no basis, COURTS SHOULD NOT HESITATE TO REJECT IT."

19 Federal courts likewise require parole decisions to be  
20 reasonable. As an example, in a parole rescission case, a federal  
21 court in this state held: "the Court of Appeals conclusory findings  
22 that there was 'some evidence' to support the rescinding, the BPH's  
23 decision that parole was improvidently granted to petitioner are  
24 contrary to clearly established federal law and, to the extent they  
25 are fact-based, represent unreasonable determinations of the facts  
26 in light of the evidence presented in the state court proceedings."  
27 Stockton v. Hepburn (N.D. Cal. 2005) 2005 U.S. Dist. LEXIS 4877 at  
28 43; see also Irons v. Warden (N.D. Cal. 2004) 358 F.Supp.2d 936,

1 948 ("Clearly, a conclusion by lay BP[H] commissioners that  
 2 petitioner has not yet achieved required therapy for insight OR  
 3 OTHER REASONS is not reasonably sustainable, and a state court's  
 4 conclusion to the contrary is patently unreasonable.")

5 The federal liberty interest is made an adjunct to the state  
 6 requirements of due process by and through the 14th Amendment to  
 7 the U.S. Constitution and the substantial evidence of the federal  
 8 standard must be overcome to meet federal guarantees to its citizens  
 9 who, before they became entitled to state civil rights, were first  
 10 bestowed by operation of their federal citizenship. A state cannot  
 11 lawfully deny any federal right to its citizens but that is exactly  
 12 what respondents are demanding of their agents in the BPH, and will  
 13 no doubt now ask this Honorable Court to signoff on. That must not  
 14 be allowed if the judiciary is to be truly separated from the  
 15 Executive charades disguised as a legitimate exercise in freedom.

16 The goal of indeterminate sentences and the parole system is  
 17 not only to punish, but also to provide for reformation and  
 18 rehabilitation as the CDC's renaming suggests:

19 "The belief no longer prevails that every offense in  
 20 a like legal category calls for an identical punish-  
 21 ment without regard to past life and habits of a parti-  
 22 cular offender. ... Retribution is no longer the domi-  
 23 nant objective of the criminal law. Reformation and  
 24 rehabilitation of offenders have become important goals  
 25 of criminal jurisprudence."

26 People v. Morse (1964) 60 Cal.2d 631, 643 n.8 (quoting Williams  
 27 v. State of New York (1949) 337 U.S. 241, 247). In a lengthy discus-  
 28 sion of this topic, the Supreme Court stated the following:

29 "[T]he purpose of the indeterminate sentence law, like  
 30 other modern laws in relation to the administration  
 31 of criminal law, is to mitigate the punishment which  
 32 would otherwise be imposed upon the offender. These  
 33 laws place emphasis upon the reformation of the offender.

1 They seek to make the punishment fit the criminal rather  
 2 than the crime. They endeavor to put before the prisoner  
 3 great incentive to well-doing in order that his will  
 4 to do well should be strengthened and confirmed by the  
 5 habit of well-doing. [...] [The] interests of society  
 6 require that under prison discipline every effort should  
 7 be made to produce a reformation of the prisoner. ...  
 8 The legislative policy [was to provide a system whereby]  
 9 a hope was to be held out to prisoners that through  
 10 good conduct in prison and a disposition shown toward  
 11 reformation, they might be permitted a conditional liber-  
 12 ty upon restraint under which they might be restored  
 13 again to society. ... Although good conduct while in-  
 14 carceratd and potential for reform are not the only  
 15 relevant factors, this court has acknowledged their  
 16 significance. Furthermore, the Authority has declared  
 17 that these factors are among those of 'paramount impor-  
 18 tance. In re Minnis, 7 Cal.3d 644-45.

19 The Rosenkrantz Court, at 656, citing to Minnis, reaffirmed  
 20 these principles: "[E]ven before factors relevant to parole de-  
 21 cisions had been set forth expressly by statute and regulations,  
 22 we concluded that '[a]ny official or board vested with discretion  
 23 is under an obligation to consider all relevant factors [], and  
 24 the [BPH] can't, consistently with its obligation, ignore post-  
 25 conviction factors UNLESS DIRECTED TO by the Legislature." (citing  
 26 Minnis at 645; emphasis added for illumination).

27 Petitioner has a Constitutional liberty interest in parole  
 28 decisions and "[P]arole applicants in this state have an expectation  
 29 that they will be granted parole unless the BPH finds, in its  
 30 reviewable discretion, that they are unsuitable for parole in light  
 31 of the circumstances specified by statute and regulation."  
 32 Rosenkrantz at 654 and at 659-61 this liberty interest is an  
 33 expectation protected by due process of law. (holding that the  
 34 California Constitution Art. V, §8(b) and PC §3041 "give rise to  
 35 a protected liberety interest" in that "a prisoner granted parole  
 36 by the BPH has an expectation that the Governor's decision to affirm

1 modify, or reverse the BPH's decision will be based upon the same  
2 factors the BPH is required to consider," and that "this liberty  
3 interest underlying a Governor's parole review decision is protected  
4 by due process of law.").

5 Federal courts have also unequivocally held that California's  
6 parole system gives rise to a liberty interest constitutionally  
7 protected by due process. See: Allen, infra at 376-78; Greenholtz  
8 v. Inmate of Neb. Penal & Corr. Complex (1979) 442 U.S. 1, 11-12  
9 (holding a state's statutory parole scheme that uses mandatory  
10 language may create a presumption that parole release will be  
11 granted upon certain circumstances or findings, thus giving rise  
12 to a constitutionally protected liberty interest); McQuillen, supra  
13 at 902-3 n.1 (holding that because parole scheme uses mandatory  
14 language and is largely parallel to the schemes found in Allen  
15 and Greenholtz do give rise to a protected liberty interest in RELEASE  
16 ON PAROLE, "California's parole scheme gives rise to a cognizable  
17 liberty interest in release on parole.") Biggs v. Terhune (9th  
18 Cir. 2003) 334 F.3d 910, 914-15 (same) and, ("[t]he liberty interest  
19 is created, not upon the grant of a parole date, but upon the  
20 incarceration of the inmate."

21 Rosenkrantz specifically rejected any position that a court  
22 may not properly examine the factual basis of parole decisions  
23 at 667, "[W]e conclude that the courts properly can review a  
24 Governor's decisions whether to affirm, modify, or reverse a parole  
25 decision by the BPH to determine whether they comply with due  
26 process of law, and that such review properly can include a determi-  
27 nation of whether the factual basis of such a decision is supported  
28 by some evidence in the record that was before the BPH.

1 Post-Rosenkrantz, courts have reaffirmed the concepts of broad  
2 executive deference but vigilant judicial review, by engaging care-  
3 ful analysis, will ensure that the boundaries of due process are  
4 respected and upheld. "[t]he exceedingly deferential nature of  
5 the "some evidence" standard of judicial review set forth in  
6 Rosenkrantz does not convert a court reviewing the denial of parole  
7 into a potted plant." In re Scott (119 Cal.App.4th 871, 898, re-  
8 cently affirmed).

9 The Court, in In re Dannenberg (2005) 34 Cal.4th 1061 at 1095  
10 n.16 reaffirmed that effective judicial review is critical to due  
11 process. Rejecting the dissent's suggestion that the opinion "per-  
12 mits untethered pro forma parole denials that are insulated from  
13 effective judicial review, thus contravening California life in-  
14 mates' due process rights to individualized parole consideration,"  
15 the majority made clear that the [BPH] must apply detailed standards  
16 in evaluating individual inmates' suitability for parole on public  
17 safety grounds, and that the Executive's broad discretion is subject  
18 to meaningful judicial oversight.

19 There is no question that the discretion afforded to the BPH  
20 with respect to parole decisions is great. However, the parole  
21 system's very purpose is to provide for the reentry into society  
22 of inmates who no longer pose a danger or unreasonable threat to  
23 public safety, and those rights afforded thereunder are  
24 constitutionally protected.

25 The BPH must abide by due process considerations, and the  
26 courts are entrusted with ensuring that such considerations are  
27 adequately respected and thus protected. Neither Rosenkrantz or  
28 Dannenberg permits respondents to immunize themselves from re-

1 view by unreasonable and possibly unlawful assertion that certain  
2 facts support a denial of parole. On the contrary, Rosenkrantz  
3 and Dannenberg make clear that the courts have a vital and therefore  
4 important role to play in ensuring that parole decisions are  
5 actually supported by "some evidence" having a basis in fact, and  
6 an indicia of reliability supported in the record.

7 Petitioner submits that there is a real danger that, improperly  
8 understood, the guidelines articulated in Rosenkrantz, Dannenberg,  
9 and the court of appeals will serve to provide respondents with  
10 de facto immunity from judicial review, a result anathema to state  
11 and federal due process protections. Properly understood, the "some  
12 evidence" standard provides a fair and proper framework for review  
13 of parole decisions in any venue, one that provides respondents  
14 with an appropriate level of deference in making extremely difficult  
15 decisions relating to inmates' liberty interests and public safety  
16 concerns, while ensuring that statutory and constitutional liberty  
17 interests are being adequately and lawfully safeguarded through  
18 judicial review. And, when this standard is properly applied to  
19 this case, there should be no doubt but that the BPH's denial of  
20 suitability seems unsustainable and must be reversed, a new hearing  
21 granted, and an Order with instructions issued.

22 WHEREFORE, Petitioner prays that the writ be granted in full  
23 and all available relief be accorded to Petitioner to comply with  
24 and comport to the state and federal Constitutions and the legal  
25 adversarial process and resolution of a judicious nature in this  
26 most important matter herein. Petitioner hereby incorporates by  
27 reference, as though fully set forth, all papers, pleadings,  
28 transcripts, exhibits and matters of record in the instant matter.

7. Ground 2 or Ground -3- (if applicable):

PETITIONER HAS A FEDERALLY-COGNIZABLE LIBERTY INTEREST IN RELEASE TO PAROLE CREATED BY RESPONDENT'S STATUTORY SCHEME AND MANDATORY LANGUAGE OF THE ENABLING STATUTES THAT REQUIRES A SUITABILITY FINDING UNDER STATUTORY CRITERIA AND RESPONDENTS' BURDEN IS NOT MET HEREIN

a. Supporting facts:

This petition is intended to give legitimate meaning to petitioner's seven (7) years-to-Life sentence by seeking an Order in this Court granting the writ to discharge petitioner from state prison, or alternatively, compelling the BPH to conduct a new parole consideration hearing and correctly weight their statutory findings to view suitability and consequent release to parole for Petitioner.

The issues raised are of constitutional dimension, comporting to petitioner's federal constitutional rights, and questioning the legality of petitioner's continued confinement in the face of overwhelming evidence of legally-sustainable proof of suitability and unquestioned state-hired professionals and their proffered opinions of reasonable assurance in adhering to concerns of public safety.

There is NO evidence having indicia of reliability that this petitioner poses an unreasonable risk of danger to the public and P.C. §3041(a) and California Code of Regulations (CCR), Title 15, Division II §§2402(d)(1,2,3,4,6,7,8 & 9) (parole suitability criteria) all make it clear that there IS A MANDATE, based on a legally-sufficient standard, and that standard is subject to judicial review  
(continued on attached pages)

b. Supporting cases, rules, or other authority:

(SEE ATTACHED POINTS AND AUTHORITIES)

(continued from previous page):

for abuse of discretion under a federal due process and equal protection umbrella with safeguards required in a review of the "evidence" of unsuitability that is burdened upon respondents.

The California Supreme Court recognizes that prisoners have procedural due process protections in connection with parole determinations. A legitimate expectancy of release to parole is created by PC § 3041. If the statute creates the legitimate expectancy of parole, it is not legally sufficient to answer that the BPH may, in its broad discretion, deny parole suitability.

This argument, that the BPH's broad discretion swallowed Petitioners liberty interest and expectation of release was squarely rejected by the High court in Allen, supra. Additionally, the Court stated in Rosenkrantz IV: "[P]arole applicants in this state *Have an expectation that they will be granted parole* unless the BP[H] finds in its discretion, that they are unsuitable for parole **in light of the circumstances specified by statute and regulation.**" Rosenkrantz V, supra, 29 Cal.4<sup>th</sup> at 654. And, [O]ur past decisions make clear that the **requirement** of procedural due process embodied in [Art. I, § 7, subd. (a)], places some limitations upon the broad discretionary authority of the BP[H]." Id. at 655.

Therefore, it is inherently clear that the presence of discretion held by the BPH does not, under either state or federal law, diminish nor extinguish the expectancy of release to parole nor in any ways Petitioner's due process rights. It thus follows that a liberty interest has existed under PC § 3041 that is embodied in, and protected by, the Fourteenth Amendment's Due Process Clause.

Also, CCR regulations use the "shall/unless" language (§§ 2401-2402) and recognize all available rights to Petitioners. Further, these regulations AS ORIGINALLY WRITTEN, made it even clearer that parole was to normally to be granted. This remained so until political operatives, presumably with a criminal bent, manipulated the executive and legislative branches to repeal this proviso and substitute a "Willie Horton" revision that was never fully explained to the public nor openly voted upon for acceptance and would've probably failed it there had been an honest attempt to do so.

For respondents to abrogate this federal liberty interest they must provide *substantial* relevant, reliable evidence having some indicia of credibility that Petitioner poses a CURRENT **unreasonable** threat to the public safety, as noted in In re Lee (10-10-06) Second District Court of Appeals, Division Eight; 49 Cal.Rptr.3<sup>rd</sup> 931,

A

In re: Peter Hernandez, on habeas corpus

1 where the court cautioned:

2 ["The commitment offense can negate suitability [for parole] only if circumstances of the crime ...  
 3 rationally indicate that the offender will present an unreasonable public safety risk if released from  
 4 prison."] In re Scott (2005) 133 Cal.App.4<sup>th</sup> 573, 595, [however], In re Lowe (2005) 130 Cal.App.4<sup>th</sup>  
 1405, suggested "some evidence" applies to the factors, not dangerousness.) Some evidence of  
 the existence of a particular factor does not necessarily equate to some evidence the [inmate's]  
 release unreasonably endangers public safety." Lee, supra, 936.

5 ¶The board and governor must focus their parole decisions on whether a prisoner  
 6 continues to pose an unreasonable risk to public safety. Such a practical inquiry, rooted in real  
 world crime and law and order, has no obvious intersection with incorporeal realm of legal  
 constructs." Id. at 940.

7  
 8 This is something they have patently failed to do, as testified to by virtually all of their own witnesses as  
 9 noted in attached Exhibit "C", which has been previously generated BY RESPONDENTS and provided to all  
 10 concerned parties prior to Petitioner's various hearings and with NO OBJECTIONS from respondents as being  
 11 accurate and meaningful to ascertain PRESENT DANGEROUSNESS.

12 "Unreasonable risk" evidence that meets the federal level of reliability must be drawn from an  
 13 individualized analysis of fifteen (15) factors identified by regulations: CCR § 2402(b); Rosenkrantz V at 653-54.  
 14 "Such information shall include circumstances of the prisoner's social history; past and present mental state; past  
 15 criminal history; [] the base and other commitment offenses; past and present attitude toward (sic) the crime; any  
 16 conditions of treatment or control ...; and any other information that bears on the prisoner's suitability for  
 17 release." (emphasis added.)

18 This extensive list of factors, including other relevant reliable information that must be considered, makes  
 19 it clear that the Legislature did not intend for any single factor to initially or consistently trump all the others. This  
 20 is exactly what is happening here however. Decision upon decisions by the BPH suggests that their focus is  
 21 exclusively on the commitment offense, a sub-factor among the total. The BPH insistently attempts to insulate  
 22 their failure to individually consider circumstances of suitability using makeweight exceptions to state by rote that,  
 23 'although post-conviction behavior was DULY CONSIDERED, and the inmate is otherwise suitable for release to  
 24 parole, the offense was so heinous, atrocious, or cruel, that Petitioner is ineligible for a finding of suitability. "The  
 25 evidence under-lying the BPH's decision must have some indicia of reliability." Jancsek v. Oregon Board of  
 26 Parole (9<sup>th</sup> Cir. 1987) 833 F.2d 1389, 1390.

27 The reduction of the parole assessment process to an occluded, myopic pseudo-consideration of the

28 B

In re: Peter Hernandez, on habeas corpus

one factor, and it alone—unerringly as an unwritten but accepted general rule practiced in all circumstances—was never intended by the Legislature and cannot be permitted nor allowed to continue and still comport with Rosenkrantz, Biggs, Martin, Morrall, Irons, Coleman, et cetera. See also: Environmental Defense Center, Inc. v. E.P.A. (2003) 344 f.3D 832, 858, fn. 36, (holding that a federal agency has acted in an arbitrary and capricious fashion, if “the agency has relied on factors that Congress has not intended to consider, entirely failed to consider an important aspect of the problem, and offered no explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a different view or the product of agency expertise.”); Arizona Cattlegrower’s Ass’n v. U.S. Fish & Wildlife, B.L.M. (9<sup>th</sup> Cir. 2001) 273 F.3d 1229, 1236 (holding judicial review under the “arbitrary and capricious” standard is “meaningless ... unless we carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors ...[:] while reviewing courts should uphold reasonable and defensible constructions of an agency’s enabling act, they must not rubber-stamp ... administrative decisions that they deem in-consistent with a or that frustrate the congressional policy underlying a statute.”)

First degree murder is not a crime that automatically allows one to be deemed unsuitable for release and parole. And, given the above directive in Environmental Defense Center, Inc. v. E.P.A and Arizona Cattlegrower’s Ass’n v. U.S. Fish & Wildlife, B.L.M., coupled with Rosenkrantz, Biggs, Martin, Morrall, Irons, Coleman, et al., there must be a base set of factors upon which a first degree murderer would have to be paroled or the BPH would risk violating due process. To determine what would qualify as more than the minimum necessary for a conviction, the courts must first consider what is required, at the minimum, for a conviction of first-degree murder.

Now that the crime is defined, the question must be what evidence indicates that any particular first degree murder was somehow “beyond the minimum necessary to sustain a conviction.” In sum: what evidence indicates the commitment offense was “*especially* heinous” or “*exceptionally* grave”, given that there typically must be a finding of some level of heinousness, callousness, and/or gravity of violence in order for a defendant to have had his first degree murder conviction sustained by the appellate courts in the first place?

Two previous panels found Petitioner suitable long ago and the only changes to these original grants has been a continued progress towards maturity, self-awareness, anger management and the kind of programming

C.

In re: Peter Hernandez, on habeas corpus

1 which will assure Petitioner's continued positive behavior and determination and almost certain success as a  
2 parolee and valuable contributing member of the community.

3 The weapon enhancement does not reasonably demonstrate that this crime was "beyond the minimal  
4 elements" of a first-degree murder conviction, and is in no way some evidence establishing that he is currently an  
5 unreasonable threat to public safety. Indeed, if the BPH were to be able to rely on "weapon of choice" evidence  
6 in every case, **every** first degree murder would be "beyond the minimal elements" and there would be no way to  
7 commit a first degree murder in California that did not qualify as an "especially" heinous crime and thereby justify  
8 imprisonment for life, without any chance of parole. This is not what the Legislature wrote the enhancement  
9 statutes for nor the intended outcome of any additional punishment attached thereto, and exceeds the bounds of  
10 common sense in every conceivable manner.

11 This rendition illustrates further, the importance (given the short tenure of the suggestion that "some  
12 evidence" may be found in facts 'beyond the minimum necessary elements' of the commitment offense) of all  
13 courts providing enhanced guidance regarding what set of facts are sufficient to support a denial of parole  
14 suitability. Invariably, any such guidance should summarily relate to the relevance of the evidence; whether or  
15 not it is substantial for federal due process purposes; its relevance and its reliability; and the reasonableness one  
16 should exact in being able to conclude that the evidence sub-stantiates that the inmate is a CURRENT,  
17 UNREASONABLE THREAT to the safety and security of the public and the ability to lawfully abide within the  
18 community.

19 Sole reliance on the commitment offense to deny parole not only augurs the serious risk of being  
20 arbitrary AND capricious but is almost always counter-instructive. In the parole determination process, the panel  
21 is tasked with assuring the Executive branch the parole-worthy inmate was duly considered by determining if the  
22 prisoner is a CURRENT threat to the public safety. This determination is, in total, the only decision that the BPH  
23 is sanctioned to make by the Penal Code and Regulations codified for that purpose. All interpretations of  
24 mitigating and aggravating factors, and the weight given to the special circumstances of the offense, merely go  
25 to instruct this final conclusion. "A determination of unsuitability is simply shorthand for a finding that a prisoner  
26 CURRENTLY would pose an unreasonable risk of danger if released at this time." Smith, supra, at p. 370, (citing  
27 C.C.R. § 2402(d), emphasis added.)

28 D

In re: Peter Hernandez, on habeas corpus

1 WHEREFORE, Petitioner respectfully submits these issues, arguments and Exhibits and prays this  
2 Honorable Court and all Honorable Justices will grant the writ and Order Petitioner's release forth-with. Or, in the  
3 alternative, Order a Rehearing within thirty (30) days of the Order with instructions to individualize his complete  
4 suitability consideration without bias or political, personal, or tenurial consid-erations, and in accordance with the  
5 statutory mandate of P.C. § 3041(a), and any further relief as the Court may deem just and proper to protect  
6 Petitioner's civil rights.

7 ///

8 ///

9 ///

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes. ☐ No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

b. Result: N/A c. Date of decision: \_\_\_\_\_

d. Case number or citation of opinion, if known: \_\_\_\_\_

e. Issues raised: (1) \_\_\_\_\_

(2) \_\_\_\_\_

(3) \_\_\_\_\_

f. Were you represented by counsel on appeal? ☐ Yes. ☐ No. If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court? ☐ Yes. ☐ No. If yes, give the following information:

a. Result: N/A b. Date of decision: \_\_\_\_\_

c. Case number or citation of opinion, if known: \_\_\_\_\_

d. Issues raised: (1) \_\_\_\_\_

(2) \_\_\_\_\_

(3) \_\_\_\_\_

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

THESE ISSUES ARE BEING TIMELY MADE FOR THE FIRST TIME ON THIS APPEAL

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

THERE IS NO ADMINISTRATIVE REMEDY AVAILABLE TO PURSUE

b. Did you seek the highest level of administrative review available? ☐ Yes. ☐ No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☒ Yes. If yes, continue with number 13. ☐ No. If no, skip to number 15.

13. a. (1) Name of court: L.A. COUNTY SUPERIOR COURT

(2) Nature of proceeding (for example, "habeas corpus petition"): HABEAS PETITION

(3) Issues raised: (a) BPH VIOLATION OF FEDERAL DUE PROCESS

(b) BPH VIOLATION OF FEDERAL EQUAL PROTECTION

(4) Result (Attach order or explain why unavailable): DENIED

(5) Date of decision: 9-24-07

b. (1) Name of court: \_\_\_\_\_

(2) Nature of proceeding: \_\_\_\_\_

(3) Issues raised: (a) \_\_\_\_\_

(b) \_\_\_\_\_

(4) Result (Attach order or explain why unavailable): \_\_\_\_\_

(5) Date of decision: \_\_\_\_\_

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

N/A

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

THERE HAS BEEN NO DELAY IN SEEKING THIS PETITION FOR RELIEF AND ONLY

WITHIN THE ALLOTTED AND MANDATED TIME FRAME HAS PETITIONER PROCEEDED

16. Are you presently represented by counsel? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☒ No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

PETITIONER HAS PRESENTED THIS MATTER TO THE LOWER COURT FOR REMEDY

AND ONLY AFTER DENIAL OF REMEDY HAS VENUE BEEN SOUGHT IN THIS COURT

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 10-05-07

(SIGNATURE OF PETITIONER)

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES****DEPT 100**

Date: SEPTEMBER 24, 2007

Honorable: PETER ESPINOZA  
NONEJudge  
BailiffJOSEPH M. PULIDO  
NONEDeputy Clerk  
Reporter

(Parties and Counsel checked if present)

BH004508

In re,  
PETER HERNANDEZ,  
Petitioner,  
On Habeas Corpus

Counsel for Petitioner:

Counsel for Respondent:

## Nature of Proceedings: ORDER RE: WRIT OF HABEAS CORPUS

The Court has read and considered the Petition for Writ of Habeas Corpus filed by Petitioner on February 23, 2007 challenging a July 13, 2006 determination by the Board of Prison Terms (hereafter "Board") that Petitioner is not suitable for parole. Having independently reviewed the record, giving deference to the broad discretion of the Board in parole matters, the Court concludes that the record contains "some evidence" to support a finding that petitioner would pose an unreasonable risk of danger to society and is unsuitable for parole (*See* Cal. Code Reg. Tit. 15, §2281; *In re Rosenkrantz* (2002) 29 Cal.4<sup>th</sup> 616, 667).

Petitioner was received in the Department of Corrections on March 23, 1979 after a conviction for first degree murder and assault with intent to commit murder. Petitioner was sentenced to 7 years to life. His minimum parole eligibility date was September 3, 1985.

The record reflects that the commitment offense occurred on April 25, 1977 when Petitioner and his crime partner approached the three victims in a residential area of Los Angeles. Following a brief conversation, Petitioner pulled a gun from his coat and fired a shot at the victim at point blank range, killing him. The two remaining victims ran from the scene but were pursued by Petitioner who continued firing, striking both men in the leg as his crime partner yelled "Get them, Get them." After emptying the weapon, Petitioner returned with his crime partner to their vehicle and fled the scene.

Petitioner was later identified by his wounded victims. The record indicates that subsequent investigation revealed that Petitioner had attempted to purchase marijuana and, when advised that the victims had none, opened fire. Petitioner maintained his innocence until his appeals were exhausted after which time he admitted his guilt.

At his parole consideration hearing, Petitioner admitted that he had committed the crime and related the following details. The crime occurred while Petitioner was seeking to retrieve items that were previously stolen from his sister's house in a burglary. Petitioner's crime partner had identified someone who might be in possession of the stolen items. Petitioner unsuccessfully attempted to see this person but was rebuffed by another who pulled a weapon and told him to leave. Petitioner did so but upon the suggestion of his crime partner obtained a gun and returned to the neighborhood to try to retrieve the property. During a discussion with the victim on a sidewalk, the victim denied having any of the property and approached Petitioner with his

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DEPT 100

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Reporter

(Parties and Counsel checked if present)

BH004508

In re,  
PETER HERNANDEZ,  
Petitioner,  
On Habeas Corpus

Counsel for Petitioner:

Counsel for Respondent:

hand in his pocket. Petitioner pulled the gun from his pocket, fatally shot the decedent once in the chest and turned to shoot at the decedent's two companions, firing until the gun was empty.

The Board found Petitioner unsuitable for Parole, noting "we come to this conclusion by the commitment offense that was committed in a special callous manner." The Board noted that multiple victims were involved and cited the motive for the crime as a factor supporting its determination. The Board noted Petitioner's prior conviction for auto theft and a failure to avoid subsequent criminal conduct after probation. The Board noted Petitioner's institutional disciplinary history, including four CDC 115s, three of which were for fighting or mutual combat. The Board also considered Petitioner's positive 2004 psychological report, his extensive vocational training and other achievements. The Board also found Petitioner's parole plans to be unrealistic. The Board decision stated that "there is virtually no employment plan . . . , [a]nd your residential plans of sharing a two-bedroom residence with two adults and three . . . children seems suspect."

The Board's discretion in analyzing factors to determine whether the Petitioner "will be able to live in society without committing additional antisocial acts" is "almost unlimited." *In re Rosenkrantz, supra*, 29 Cal. 4<sup>th</sup> at 655. "[T]he court may inquire only whether *some evidence* in the record before the Board supports the decision to deny parole based upon the factors specified by statute and regulation." *In re Rosenkrantz, supra*, 29 Cal. 4<sup>th</sup> at 658. "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the [Board]. . . ." *In re Rosenkrantz, supra*, 29 Cal. 4<sup>th</sup> at 677.

In reaching its decision, the Board considered and weighed the factors bearing on Petitioner's suitability for parole, primarily basing its determination on the circumstances of the commitment offense. The commitment offense alone may be a circumstance tending to establish an inmate's unsuitability if the circumstances are beyond the minimum necessary to sustain a conviction for that offense. (*Rosenkrantz, supra*, 29 Cal. 4<sup>th</sup> 616, 683.). Such circumstances were found by the Board in the fact that multiple victims were attacked or injured. There is "some evidence" to support this finding, as Petitioner shot and killed one victim, then turned to the other two victims, shooting each in the leg while emptying his gun. One of the circumstances tending to indicate unsuitability for parole is that the offense was committed in an especially heinous, atrocious or cruel manner. (*Rosenkrantz, supra*, 29 Cal. 4<sup>th</sup> 616, 683.); Cal. Code Reg. Tit. 15, §2281(c)(1). The fact that multiple victims were attacked is a factor upon which the Board may properly rely in finding the commitment offense to be determinative of Petitioner's unsuitability for parole. Cal. Code Reg. Tit. 15, §2281(c)(1)(A).

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES****DEPT 100**

Date: SEPTEMBER 24, 2007

Honorable: PETER ESPINOZA

NONE

Judge

JOSEPH M. PULIDO

Bailiff

NONE

Deputy Clerk

Reporter

(Parties and Counsel checked if present)

BH004508

In re,

PETER HERNANDEZ,

Petitioner,

On Habeas Corpus

Counsel for Petitioner:

Counsel for Respondent:

Applying the extremely deferential standard required by *Rosenkrantz*, the court does not reweigh the relevant factors to determine whether the weight of the evidence supports a grant of parole. *See In re Jacobson*, No. BH003835 (August 28, 2007) Second Appellate District), slip op. at 18. Because there is "some evidence" to support the Board's determination, the petition is denied.

The court order is signed and filed this date. The clerk is directed to give notice.

A true copy of this minute order is sent via U.S. Mail to the following parties:

Peter Hernandez

C-03015

Correctional Training Facility

P.O. Box 689

Soledad, California 93960-0689

State of California- Department of Justice

Office of the Attorney General

110 West A Street, Suite 1100

P.O. Box 85266

San Diego, California 92186-5266

Attn: Ms. Cynthia Lumely

**EXHIBIT D**

EDMUND G. BROWN JR.  
Attorney General

**CONFORMED COPY**

State of California  
DEPARTMENT OF JUSTICE



CLERK'S OFFICE  
COURT OF APPEAL, SECOND DISTRICT  
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December 14, 2007

Mr. Joseph Lane, Clerk  
Court of Appeal of the State of California  
Second Appellate District, Division One  
300 South Spring Street, 2<sup>nd</sup> Floor  
Los Angeles, CA 90013

RE: INFORMAL OPPOSITION  
In re PETER HERNANDEZ, Case No. B202757

Dear Mr. Lane:

Respondent submits this letter pursuant to the Court's November 2, 2007 request for an informal opposition to the petition for writ of habeas corpus filed by Peter Hernandez. Petitioner claims the Board of Parole Hearings (Board) improperly denied his release on parole.

Hernandez asserts the Board's decision to deny parole is not supported by any evidence. However, Hernandez does not dispute the factual basis upon which the Board denied parole. Rather, Hernandez argues that the Board should have given greater weight to the positive parole factors in finding him suitable for parole. This claim lacks merit.

On July 13, 2006, the Board found Hernandez unsuitable for parole based upon: (1) the gravity of the commitment offenses; (2) previous criminal conduct; (3) previous failures at rehabilitation; (4) a record of violence and disciplinary problems in prison; and (5) unrealistic parole plans. (Ex. 1 - Tr. of 2006 Parole Consideration Hearing, at pp. 70-77.)

The Supreme Court outlined the applicable standard of review: "the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658.) Here, there is some evidence to support the Board's decision to deny parole.

Prior to committing the convicted offenses, Hernandez had convictions for auto theft, shoplifting, and public intoxication. (Ex. 1, at pp. 25-29.) The Board noted that despite two terms of probation, Hernandez failed to rehabilitate himself and continued with his criminal activity after each grant of probation. (Ex. 1, at pp. 26, 28, 71.) Hernandez continued his criminal behavior even in prison--resulting in eleven disciplinary violations. (Ex. 1, at p. 36.) He received seven misconduct reports, the last of which occurred in 2000 for disobeying staff. (Ex. 1, at p. 36.) Hernandez also committed four serious disciplinary violations, three of which

EDMUND G. BROWN JR.  
Attorney General

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DEPARTMENT OF JUSTICE



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December 14, 2007

Mr. Joseph Lane, Clerk  
Court of Appeal of the State of California  
Second Appellate District, Division One  
300 South Spring Street, 2<sup>nd</sup> Floor  
Los Angeles, CA 90013

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On July 13, 2006, the Board found Hernandez unsuitable for parole based upon: (1) the gravity of the commitment offenses; (2) previous criminal conduct; (3) previous failures at rehabilitation; (4) a record of violence and disciplinary problems in prison; and (5) unrealistic parole plans. (Ex. 1 - Tr. of 2006 Parole Consideration Hearing, at pp. 70-77.)

The Supreme Court outlined the applicable standard of review: "the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658.) Here, there is some evidence to support the Board's decision to deny parole.

Prior to committing the convicted offenses, Hernandez had convictions for auto theft, shoplifting, and public intoxication. (Ex. 1, at pp. 25-29.) The Board noted that despite two terms of probation, Hernandez failed to rehabilitate himself and continued with his criminal activity after each grant of probation. (Ex. 1, at pp. 26, 28, 71.) Hernandez continued his criminal behavior even in prison--resulting in eleven disciplinary violations. (Ex. 1, at p. 36.) He received seven misconduct reports, the last of which occurred in 2000 for disobeying staff. (Ex. 1, at p. 36.) Hernandez also committed four serious disciplinary violations, three of which

Second Appellate District

December 13, 2007

Page 2

involved fighting or violent behavior. (Ex. 1, at pp. 36-37.) The last such violation occurred in December 1998 for mutual combat. (Ex. 1, at p. 36.)

The Board viewed the instant offenses as egregious crimes. (Ex. 1, at p. 70.) The Board noted Hernandez had armed himself and sought out a confrontation in which he attacked multiple victims. (Ex. 1, at p. 70.) Hernandez admitted to shooting three unarmed men, killing one and wounding the other two as they fled. (Ex. 1, at p. 10.) The Board found the claimed motive—to retrieve property—to be trivial or inexplicable in relation to the crime. (Ex. 1, at pp. 70-71.) Additionally, the Board found Hernandez did not have an employment plan and questioned his plan to live in a two-bedroom residence with five other people. (Ex. 1, at p. 71.)

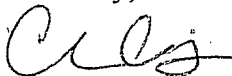
The some evidentiary support for the Board's findings that previous rehabilitative efforts were futile, that Hernandez engaged in violent behavior in prison, that Hernandez's offenses were egregious crimes, and that Hernandez did not have adequate parole plans. As such, the Board properly exercised its discretion to deny parole.

The Board considered the positive elements of Hernandez's record, but placed greater weight upon the negative factors. The importance to be attributed to a particular parole factor is left to the judgment of the Board. (Cal. Code Regs., tit. 15, § 2402, subds. (c)-(d).) Thus, whether the Board could have emphasized the positive factors is not a basis for habeas corpus relief: "It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole." (*Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

While Hernandez argues that the Board may not rely solely upon his commitment offenses, this argument is inapplicable here because the Board did not deny parole solely upon his convicted crimes. Additionally, Hernandez's request for a stricter standard of review than the some-evidence test has no legal basis. (See *id.* at p. 658.)

As there is some evidence supporting the Board's decision and Hernandez presents no adequate ground for habeas corpus relief, the petition must be denied.

Sincerely,



CHARLES CHUNG  
Deputy Attorney General  
State Bar No. 248806

For EDMUND G. BROWN JR.  
Attorney General

**EXHIBIT 1**

SUBSEQUENT PAROLE CONSIDERATION HEARING

STATE OF CALIFORNIA

BOARD OF PRISON TERMS

In the matter of the Life )  
Term Parole Consideration )  
Hearing of: )  
PETER HERNANDEZ )  
\_\_\_\_\_ )

CDC Number C-03015

CORRECTIONAL TRAINING FACILITY

SOLEDAD, CALIFORNIA

JULY 13, 2006

PANEL PRESENT:

JAMES DAVIS, Presiding Commissioner  
DENNIS SMITH, Deputy Commissioner

OTHERS PRESENT:

PETER HERNANDEZ, Inmate  
PAUL TURLEY, Deputy District Attorney  
KATERA E. RUTLEDGE, Attorney for Inmate  
CORRECTIONAL OFFICERS UNIDENTIFIED

CORRECTIONS TO THE DECISION HAVE BEEN MADE

_____	No	See Review of Hearing
_____	Yes	Transcript Memorandum

Patty L. Duran, Northern California Court Reporters

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1 P R O C E E D I N G S

2 DEPUTY COMMISSIONER SMITH: We're on the  
3 record.

4 PRESIDING COMMISSIONER DAVIS: This is a  
5 subsequent parole consideration hearing for Peter  
6 Hernandez, CDC number C-03015. Today's date is  
7 July the 13<sup>th</sup>, 2006. We're located at the  
8 Correctional Training Facility in Soledad. The  
9 inmate was received on March 23<sup>rd</sup>, 1979, from Los  
10 Angeles County and a life term began on March  
11 23<sup>rd</sup>, 1979, with a minimum eligible parole date  
12 of September 3<sup>rd</sup>, 1985. The controlling offense  
13 was the inmate had been committed of murder  
14 first, case number A334928, count one Penal Code  
15 Section 187. The inmate received a term of seven  
16 years to life. This hearing is being tape-  
17 recorded and for the purposes of voice  
18 identification, we'll each state our first and  
19 last name. When it reaches you Mr. Hernandez if  
20 you'll also give us your CDC number first.

21 INMATE HERNANDEZ: Yes.

22 PRESIDING COMMISSIONER DAVIS: So I'll  
23 start in with my left. I'm James Davis, D-A-V-I-  
24 S, Commissioner.

25 DEPUTY COMMISSIONER SMITH: My name is  
26 Dennis Smith, S-M-I-T-H. I'm Deputy  
27 Commissioner.

1 DEPUTY DISTRICT ATTORNEY TURLEY: Paul  
2 Turley, T-U-R-L-E-Y. DA's Office, LA County.

3 ATTORNEY RUTLEDGE: Katera E. Rutledge,  
4 R-U-T-L-E-D-G-E, Attorney for Mr. Hernandez.

5 INMATE HERNANDEZ: Peter Hernandez,  
6 Prisoner. Prisoner number C-03015.

7 DEPUTY COMMISSIONER SMITH: Spell your  
8 last name please, sir.

9 INMATE HERNANDEZ: H-E-R-N-A-N-D-E-Z.

10 DEPUTY COMMISSIONER SMITH: Thank you,  
11 sir.

12 PRESIDING COMMISSIONER DAVIS: And let  
13 the record also reflect we're joined by two  
14 Correctional Officers who are here for security  
15 purposes only and will not be actively  
16 participating in this hearing. Before we begin,  
17 Mr. Hernandez in front of you in the laminated  
18 piece of paper if you would read the Americans  
19 with Disabilities Act Statement please.

20 INMATE HERNANDEZ: "ADA,  
21 Americans with Disabilities Act. The  
22 Americans with Disability (sic) Act is  
23 a law to help people with disability,  
24 disability problems that make it hard  
25 for some people to see, hear, to read,  
26 talk, walk, learn, (inaudible), work,  
27 take care of themselves and

1 (inaudible). Nobody can be kept out of  
2 business or activities because of  
3 disability. If you have a disability  
4 you have the right to ask for help to  
5 get ready for your BPT hearing.  
6 (inaudible) hearing, talk, read forms  
7 and papers and understand that  
8 (inaudible) making sure what you ask  
9 for to make sure that you have a  
10 disability that is covered by the ADA  
11 and that you have asked for the right  
12 kind of help. If you do not get help,  
13 or if you don't think you got the kind  
14 of help you need, ask for the BPT 1074  
15 grievance form. You can also get help  
16 to fill it out."

17 PRESIDING COMMISSIONER DAVIS: That's very  
18 good. Thank you.

19 INMATE HERNANDEZ: You're welcome.

20 PRESIDING COMMISSIONER DAVIS: And I  
21 notice you were able to do that without glasses  
22 today. Do you normally wear glasses?

23 INMATE HERNANDEZ: No, I don't.

24 PRESIDING COMMISSIONER DAVIS: Good for  
25 you. And you're able to hear me all right?

26 INMATE HERNANDEZ: Yes, sir.

27 PRESIDING COMMISSIONER DAVIS: You walked

1 here today on your (inaudible)?

2 INMATE HERNANDEZ: Yes, sir.

3 PRESIDING COMMISSIONER DAVIS: All right.

4 I see we're set and ready to go?

5 INMATE HERNANDEZ: Yes, sir.

6 PRESIDING COMMISSIONER DAVIS: Excellent.

7 I notice that with regard to the 1073 form, BPT  
8 1073 form you reviewed together with staff of the  
9 institution and it being that you do not have any  
10 disability that would be qualified under the  
11 Americans with Disabilities Act. Is that  
12 correct?

13 INMATE HERNANDEZ: That's correct.

14 PRESIDING COMMISSIONER DAVIS: All right.

15 Can you think of any reason why you would not be  
16 able to actively participate in this hearing this  
17 afternoon?

18 INMATE HERNANDEZ: No, sir.

19 PRESIDING COMMISSIONER DAVIS: Okay.

20 Great. And counselor, you're also satisfied with  
21 that?

22 ATTORNEY RUTLEDGE: Yes, sir.

23 PRESIDING COMMISSIONER DAVIS: Very well.

24 You, this hearing is being conducted pursuant to  
25 Penal Code Sections 3041, 3042 and the Rules and  
26 Regulations of the Board of Prison Terms covering  
27 parole consideration terms for life inmates. The

1 purpose of today's hearing is we once again  
2 consider the number and nature of the crimes for  
3 which you were committed, your prior criminal and  
4 social history and your behavior in the  
5 programming since you were committed. We've had  
6 the opportunity to review your Central File and  
7 your prior transcripts and you'll be given an  
8 opportunity to correct or clarify the record as  
9 we proceed. We will reach a decision today and  
10 inform you of whether or not we find you suitable  
11 for parole and the reasons for our decision. If  
12 you are found suitable for parole the length of  
13 your confinement will be explained to you.  
14 Nothing that happens in today's hearing will  
15 change the findings of the court and we're not  
16 here to retry your case. The Panel is here for  
17 the sole purpose of determining your suitability  
18 for parole. Do you understand that sir?

19 INMATE HERNANDEZ: Yes, sir.

20 PRESIDING COMMISSIONER DAVIS: And the  
21 hearing will be conducted in basically two  
22 phases. First, I will discuss with you the crime  
23 for which you were committed, as well as your  
24 prior criminal and social history. And  
25 Commissioner Smith will then discuss with you  
26 your progress, your counselor's report and your  
27 psychological evaluation, as well, as well as

1 your parole plans and any letters of support or  
2 opposition, if they may exist. Once that's  
3 concluded the Commissioner, with District  
4 Attorney and your Attorney will be given an  
5 opportunity to ask you questions. Questions that  
6 come from the District Attorney will be asked  
7 through the chair and you will respond back to  
8 the Panel with your answer. Next, the District  
9 Attorney and then your Attorney and then finally  
10 you will be given an opportunity to make a  
11 closing statement. Those statements are --  
12 should focus on why you believe that you are  
13 suitable for parole. California Code of  
14 Regulations states that regardless of time served  
15 an inmate shall be found unsuitable for and  
16 denied parole if in the judgment of the Panel the  
17 inmate would pose an unreasonable risk of danger  
18 to society if released from prison. You have  
19 certain rights. Those rights include right to a  
20 timely notice of this hearing, the right to  
21 review your Central File and the right to present  
22 relevant documents. Counselor, are you satisfied  
23 that your client's rights have been met today?

24 ATTORNEY RUTLEDGE: Yes, sir.

25 PRESIDING COMMISSIONER DAVIS: All right.  
26 Mr. Hernandez, you also have an additional right  
27 and that is to be heard by an impartial Panel.

1 Now you've heard Mr. Smith and I introduce  
2 ourselves today. Do you have any reason to  
3 believe that we would not be impartial?

4 INMATE HERNANDEZ: No, sir.

5 PRESIDING COMMISSIONER DAVIS: ,Thank you.  
6 And you will receive a written copy of our  
7 tentative decision today. That decision becomes  
8 effect within 120 days. A copy of the decision  
9 and a copy of the transcript will be sent to you.  
10 You are not required to admit your offense today  
11 or discuss your offense, however the Panel does  
12 accept the findings of the court to be true. Do  
13 you understand that?

14 INMATE HERNANDEZ: Yes, sir.

15 PRESIDING COMMISSIONER DAVIS: Great.  
16 The Board has (inaudible) process. If you  
17 disagree with anything in today's hearing you  
18 have the right to go directly to court with your  
19 complaint. Mr. Smith, we going to be dealing  
20 with anything from the confidential file  
21 (inaudible)?

22 DEPUTY COMMISSIONER SMITH: No, we will  
23 not.

24 PRESIDING COMMISSIONER DAVIS: Okay. I'm  
25 going to pass the checklist of documents to both  
26 counsel. If you would take a look at this and  
27 make sure we're offering you all the same list of

1 documents.

2 DEPUTY DISTRICT ATTORNEY TURLEY: I have  
3 those.

4 ATTORNEY RUTLEDGE: Yes, sir. Thank you.  
5 We have the document.

6 PRESIDING COMMISSIONER DAVIS: All right.  
7 Thank you. Those will be marked as Exhibit 1  
8 then. (inaudible). Ms. Rutledge, any additional  
9 documents that you'd like us to consider today?

10 ATTORNEY RUTLEDGE: No, sir.

11 PRESIDING COMMISSIONER DAVIS: Any  
12 preliminary objections?

13 ATTORNEY RUTLEDGE: We would just note  
14 that Mr. Hernandez's hearing should have been in  
15 December of last year. Is that correct?

16 INMATE HERNANDEZ: About, yes.

17 ATTORNEY RUTLEDGE: But, so it's about  
18 what, eight months behind?

19 PRESIDING COMMISSIONER DAVIS: It is.

20 ATTORNEY RUTLEDGE: Okay. We just wanted  
21 to note for the record that is beings (sic)  
22 approximately eight months behind.

23 PRESIDING COMMISSIONER DAVIS: We -- we  
24 apologize for the delay Mr. Hernandez:

25 INMATE HERNANDEZ: Okay.

26 PRESIDING COMMISSIONER DAVIS: Will your  
27 client be speaking with us today?

1 ATTORNEY RUTLEDGE: Yes.

2 DEPUTY COMMISSIONER SMITH: Actually if I  
3 can correct that. His last hearing was in  
4 January of '05.

5 ATTORNEY RUTLEDGE: Oh.

6 DEPUTY COMMISSIONER SMITH: So, so we're  
7 roughly six months --

8 ATTORNEY RUTLEDGE: Yeah.

9 DEPUTY COMMISSIONER SMITH: -- past.  
10 That was last year.

11 ATTORNEY RUTLEDGE: Okay. Thank you.

12 DEPUTY COMMISSIONER SMITH: You're  
13 welcome.

14 ATTORNEY RUTLEDGE: There was another  
15 question you had.

16 PRESIDING COMMISSIONER DAVIS: Will --  
17 will Mr. Hernandez be speaking with us today?

18 ATTORNEY RUTLEDGE: Yes, sir. He'll be  
19 speaking with you on all subjects and issues.

20 PRESIDING COMMISSIONER DAVIS: Very well.  
21 Mr. Hernandez, would you raise your right hand  
22 please, sir? Do you solemnly swear that the  
23 testimony you will give at the hearing today will  
24 be the truth and nothing but the truth?

25 INMATE HERNANDEZ: Yes, sir.

26 PRESIDING COMMISSIONER DAVIS: Okay. All  
27 right. Without objection I'm going to

1 incorporate by reference the court of appeals  
2 document from April 21<sup>st</sup>, 1981, pages through,  
3 through 8, pages 3 through 8. And they refer to  
4 the summary of the ward report of the 2004  
5 calendar starting on page 1 where it states under  
6 (a)1. Summary of the crime:

7 "On 4-25-77 at approximately 9:00  
8 p.m. Peter Hernandez and co-  
9 defendant Jose Montez approached  
10 three Mexican-American males in a  
11 residential area of Los Angeles.  
12 Following a brief conversation  
13 Hernandez pulled a gun from his  
14 coat, fired a shot at victim Tony  
15 Sanchez, S-A-N-C-H-E-Z, at point  
16 blank range killing him with a shot  
17 to the heart. Victims Rosales and  
18 Rodriguez, R-O-S-A-L-E-S, and  
19 Rodriguez, R-O-D-R-I-G-U-E-Z, ran  
20 from the scene, but were pursued by  
21 Hernandez who continued firing the  
22 gun striking both men in the leg as  
23 crime partner Montez, M-O-N-T-E-Z,  
24 yelled, 'Get them, get them'. After  
25 emptying the weapon Hernandez and  
26 Montez returned to the van that  
27 Hernandez had been driving and fled.

1 the scene. Hernandez was later  
2 identified by the wounded victims.  
3 He and Montez were apprehended at  
4 their residences on the following  
5 morning. Subsequent investigation  
6 revealed that Hernandez had  
7 attempted to purchase marijuana from  
8 the victims and when advised that  
9 they had none opened fire. Both  
10 Hernandez and Montez denied any  
11 involvement in the crime maintaining  
12 this denial through three trials,  
13 the third of which resulted in  
14 Hernandez's conviction for the  
15 present case and Montez's conviction  
16 for murder second degree. It was  
17 noted that all three victims were  
18 known gang members and that the  
19 motive for the crime was believed by  
20 the District Attorney's Office to  
21 have been gang related. Hernandez  
22 continued to maintain his innocence  
23 until exhaustion of all fuels  
24 processed at which time he admitted  
25 his guilt and the information for  
26 this came from the 61588 diagnostic  
27 being the evaluation pages 2 through

1 3 and the Probation Officer's quote  
2 pages 5 through 7 and a (inaudible)  
3 decision made on 6-28-1 pages 8  
4 through 12 and 14 through 15."

5 So, Mr. Hernandez, did you commit this  
6 crime?

7 INMATE HERNANDEZ: Yes, sir.

8 PRESIDING COMMISSIONER DAVIS: Now I know  
9 that you have a, a fairly comprehensive statement  
10 in this 2004 report as well. Why don't you tell  
11 me in your own words what happened?

12 INMATE HERNANDEZ: That afternoon I'd  
13 stopped work and, well a few weeks prior my  
14 sister's house was burglarized. We know what,  
15 when was the --

16 DEPUTY DISTRICT ATTORNEY TURLEY: Excuse  
17 me, please. Could you ask him if he could speak  
18 up just a little bit? He's (inaudible).

19 PRESIDING COMMISSIONER DAVIS:  
20 (inaudible).

21 INMATE HERNANDEZ: (inaudible).

22 PRESIDING COMMISSIONER DAVIS: (inaudible)  
23 this.

24 ATTORNEY RUTLEDGE: . You (inaudible).

25 PRESIDING COMMISSIONER DAVIS: You also --

26 INMATE HERNANDEZ: This is not  
27 (inaudible).

1           PRESIDING COMMISSIONER DAVIS: (inaudible)  
2   get you some water.

3           INMATE HERNANDEZ: Thank you. Two weeks  
4   prior my sister's house had been burglarized and  
5   we had made police reports about it, about the  
6   burglary and at that time I (inaudible) I had low  
7   confidence in the police being able to find out  
8   who it was. I thought that how, how it would be  
9   easier for me to look around and find out more or  
10   less anybody was involved in the burglary. I run  
11   down every idea that I -- there's a lot of gangs,  
12   kids in gangs, people running around doing all  
13   kinds of things like that. So that afternoon  
14   that I got off, got off of work one, one of the  
15   friends that I, a (inaudible) told me he say, he  
16   told me that he thought that he knew the person  
17   that had the property I was looking for. Cause I  
18   had, I had told most of the persons in, in the,  
19   in the neighborhood, the things that were missing  
20   from my sister's home and that I had to have  
21   them, that I needed to get them back. When he  
22   told me that he knew more or less the person  
23   could have these, these belongings then I told  
24   him, "Let's go over there and, and look for  
25   them." And that's what we did. We went over  
26   there and it must have been I think about six  
27   o'clock in the afternoon, something like that.

1 And then I (inaudible) I got to the, to the  
2 neighborhood and I spoke to one of the guys there  
3 and asked him for, for, for a person by the name  
4 of Tito that lived around there and he told me,  
5 "Yes." He pointed to a green house and said, "He  
6 lives over there." So I went over there to the  
7 house. At that point there were three gentlemen  
8 that I believe (inaudible) on the porch and one  
9 of them came down to the fence as I went to the  
10 fence and then he asked me, you know, what I  
11 wanted. I told him that I was looking for Tito  
12 and he told me that, first he said. "What for?"  
13 as I recall and I told him, "Because I, I  
14 understand he has some, some hot things for  
15 sale." He said, "Well who told you that?" I  
16 said that I just needed to talk to him. And at  
17 that point one of the other, the guy at the  
18 corner had told where the house was came, came on  
19 to the site and he says, "This guy's looking for  
20 Tito." And he goes, "Yeah, I know." So the, the  
21 other person that was on the porch came down and  
22 then he, and he, and he talked to -- so that guy  
23 asked him what I, what I want and, and he says,  
24 "He's looking for Tito for some hot stuff that he  
25 says he's trying to, he's trying to get." He  
26 said, "No, we don't have nothing like that." So  
27 he says, "Who are you anyway?" I said well, "I

1 don't know him that much, but you know." He  
2 said, "No, you get out of here." And I said,  
3 "Wait a minute I'm not leaving till I see him."  
4 He says. "You better get out of here." And he  
5 pulled out a weapon on me and he pointed it  
6 towards me and I said. "Okay, no problem."  
7 Probably I, so I, I got in the van and left. A  
8 partner, a friend of mine was with me, he told  
9 me, "You know what, you shouldn't let him get  
10 away with that." I know where's a gun, so we'll  
11 get a gun and we'll come back. And I said, "You  
12 know what, okay, let's do it." And so we went  
13 over there and he went to go see some friends, he  
14 came back and he said, "Here, I got a gun." And,  
15 and I said. "Okay, let me have it." Then I got  
16 it and put it in my jacket pocket. At that point  
17 I drove back to that area. I passed through the  
18 house, I didn't see nobody there. As I was going  
19 by the, as I was going to the corner and I saw  
20 three individuals that were standing by, by the  
21 corner market store and when I, when I passed  
22 through slow I took a look at them then I noticed  
23 that at least two of them were the same ones that  
24 I was talking to. So then I went around, parked  
25 the van, came back and then confronted them.  
26 Crossed the street in front of them and, and the  
27 first person -- happened to be people that was

1 standing. I didn't know at that time because I  
2 didn't know (inaudible). So when, when, when I  
3 went, came to the, to the parked cars onto the  
4 sidewalk he kind of like went back and was  
5 surprised to see us. And goes, "Who are you?" I  
6 said, "I'm looking for Tito." He says, "Well  
7 what do you want from him?" I said, "I'm looking  
8 because he has some belongings that, that belong  
9 to me." He says, "No, no, no." He says, "What  
10 are you talking about." I said, "You have an  
11 amplifier that, that (inaudible) were," excuse  
12 me, "those were the things that were, that were  
13 missing after the burglary. So I'm, I'm looking  
14 for an amplifier and a, and a, and a color TV and  
15 a guitar." He said. "No we don't have none of  
16 this. Just get out of here." At that point he  
17 came toward me and he had his hand in his pocket.  
18 And I had my, my weapon in my pocket also. My,  
19 my hand was in there. So when he took two, I  
20 recall two or three steps towards me I just  
21 pulled the gun out and I fired. At that point,  
22 after the, after the, the first shot I felt the  
23 other guys get up and I just turned around and,  
24 and, and I fired at them. And they began to run  
25 and till this day I, I couldn't remember my, my,  
26 my partner saying, "Get him", or anything. I  
27 was, I don't know, I, I just didn't, didn't feel

1 right and I kept firing till the gun went empty  
2 and then I ran to, to the van and, and you know,  
3 we got, I was shaking very, very hard and I, I  
4 don't remember what I told my partner or  
5 anything. I just, just go, "You know, we got to  
6 get out of here." And I left.

7 PRESIDING COMMISSIONER DAVIS: The, the  
8 gun that you got, do you have any idea who, who  
9 that came from?

10 INMATE HERNANDEZ: It was some  
11 apartments, but I waited outside and my crime  
12 partner only went up there and got it.

13 PRESIDING COMMISSIONER DAVIS: Had you  
14 ever gotten a gun from that apartment before?

15 INMATE HERNANDEZ: No.

16 PRESIDING COMMISSIONER DAVIS: What kind  
17 of gun was it?

18 INMATE HERNANDEZ: I think it was a,  
19 looked like a nine millimeter.

20 PRESIDING COMMISSIONER DAVIS: Did you  
21 check and make sure it was loaded?

22 INMATE HERNANDEZ: You know, no, I  
23 didn't.

24 PRESIDING COMMISSIONER DAVIS: Had you  
25 ever fired that kind of gun before?

26 INMATE HERNANDEZ: No. No, I hadn't.

27 PRESIDING COMMISSIONER DAVIS: So you had

1 no idea it was going to work or not?

2 INMATE HERNANDEZ: No, I didn't.

3 PRESIDING COMMISSIONER DAVIS: Did you  
4 test it?

5 INMATE HERNANDEZ: No, I didn't.

6 PRESIDING COMMISSIONER DAVIS: So you went  
7 back and, and confronted the, confronted the  
8 person who turned out to be Tito. Was that the  
9 same person that had the weapon before?

10 INMATE HERNANDEZ: No, it wasn't.

11 PRESIDING COMMISSIONER DAVIS: Did you see  
12 a weapon on Tito?

13 INMATE HERNANDEZ: No, I didn't.

14 PRESIDING COMMISSIONER DAVIS: The other  
15 people who were there that you fired at, did you  
16 see any weapons that they might have had?

17 INMATE HERNANDEZ: No, sir.

18 PRESIDING COMMISSIONER DAVIS: Were either  
19 one of them the, the person who had the weapon  
20 before?

21 INMATE HERNANDEZ: Yes. One of them was.

22 PRESIDING COMMISSIONER DAVIS: One of them  
23 was. But you didn't see it the second time,  
24 correct?

25 INMATE HERNANDEZ: No, I didn't.

26 PRESIDING COMMISSIONER DAVIS: After all  
27 of this happened, as you shot Tito, you shot the

1 other people, got back in the van and took off,  
2 what did you do after that?

3 INMATE HERNANDEZ: Yeah. We ran and  
4 bought some beer.

5 PRESIDING COMMISSIONER DAVIS: Okay. You  
6 ran and bought some beer, then what?

7 INMATE HERNANDEZ: And then, and then I  
8 went home.

9 PRESIDING COMMISSIONER DAVIS: Then what  
10 did you do?

11 INMATE HERNANDEZ: I remember going to  
12 the restroom.

13 PRESIDING COMMISSIONER DAVIS: What did  
14 you do with the gun?

15 INMATE HERNANDEZ: Oh the gun, I gave it  
16 back to my crime partner.

17 PRESIDING COMMISSIONER DAVIS: So you  
18 returned it?

19 INMATE HERNANDEZ: Uh-huh. Yes, sir.

20 PRESIDING COMMISSIONER DAVIS: When did  
21 the police arrive?

22 INMATE HERNANDEZ: As I recall it was  
23 very early in the morning. Could have been two  
24 in the morning. Something like that.

25 PRESIDING COMMISSIONER DAVIS: What  
26 happened that evening? For you, what happened,  
27 what did you do?

1           INMATE HERNANDEZ: Well after I went  
2 back, it was about I think ten o'clock, eleven,  
3 then I just, I went to bed.

4           PRESIDING COMMISSIONER DAVIS: Did you  
5 ever find out if these people were in any way,  
6 shape or form associated with the original  
7 burglary that you were trying to recover the  
8 stuff for your sister?

9           INMATE HERNANDEZ: No.

10          PRESIDING COMMISSIONER DAVIS: That never  
11 came out? All right. When you didn't have  
12 confidence in the police to find the, the, the  
13 equipment once you had tracked down some of this  
14 information did you ever think about calling them  
15 and giving them that information?

16          INMATE HERNANDEZ: No, sir.

17          PRESIDING COMMISSIONER DAVIS: In terms of  
18 personal factors, you were born in Las Cruces,  
19 New Mexico, you're the second of two children,  
20 and if I say anything in here that isn't right or  
21 doesn't, isn't right on point please let me know.

22          INMATE HERNANDEZ: Yes, sir.

23          PRESIDING COMMISSIONER DAVIS: We'll  
24 correct that as we go along. You were raised by  
25 your mother in part and your, in part because  
26 your parents divorced when you were two years  
27 old, so you were raised by your mom?

1 INMATE HERNANDEZ: Yes, sir.

2 PRESIDING COMMISSIONER DAVIS: And have a  
3 good relationship with all your family members  
4 and a stepfather and two half brothers?

5 INMATE HERNANDEZ: Yes, sir.

6 PRESIDING COMMISSIONER DAVIS: No other  
7 family members have a problem with any arrest  
8 record or mental health issues, anything like  
9 that?

10 INMATE HERNANDEZ: No, sir.

11 PRESIDING COMMISSIONER DAVIS: But this  
12 indicates that your stepfather's an alcoholic.

13 INMATE HERNANDEZ: Yes, sir.

14 PRESIDING COMMISSIONER DAVIS: And how do  
15 you know that?

16 INMATE HERNANDEZ: Because he used to  
17 drink a lot. He was a hardworking man, but he'd  
18 always --

19 PRESIDING COMMISSIONER DAVIS: So he  
20 would -- did he abuse you at all?

21 INMATE HERNANDEZ: No. He, he never --  
22 he was --

23 PRESIDING COMMISSIONER DAVIS: Was a,  
24 wasn't a mean drunk then?

25 INMATE HERNANDEZ: No. He'd just come  
26 home, drink his beer --

27 PRESIDING COMMISSIONER DAVIS: Okay.

1 INMATE HERNANDEZ: -- and goes out on  
2 the, the couch.

3 PRESIDING COMMISSIONER DAVIS: Okay. And  
4 so for all this purposes you had a -- had a  
5 pretty normal childhood then?

6 INMATE HERNANDEZ: Yes. Yes.

7 PRESIDING COMMISSIONER DAVIS: You  
8 attended Belmont High School?

9 INMATE HERNANDEZ: Yes, sir.

10 DEPUTY COMMISSIONER SMITH: (inaudible)  
11 about that.

12 PRESIDING COMMISSIONER DAVIS: And you  
13 dropped out to enlist in the United States Army?

14 INMATE HERNANDEZ: Yes, sir.

15 PRESIDING COMMISSIONER DAVIS: And you  
16 served in the army from 2/73 until 2 of '76 and  
17 received an honorable discharge?

18 INMATE HERNANDEZ: Yes, sir.

19 PRESIDING COMMISSIONER DAVIS: Received,  
20 received the rank, or actually earned, it says  
21 you earned the rank of an E4 and served seven  
22 months in Germany while in the army?

23 INMATE HERNANDEZ: Yes, sir.

24 PRESIDING COMMISSIONER DAVIS: And it was  
25 in Germany that you began the occasional use of  
26 alcohol and marijuana?

27 INMATE HERNANDEZ: Yes, sir.

1           PRESIDING COMMISSIONER DAVIS: And you  
2   said, well you began spending most of your time  
3   off duty drinking. Let me tell you, your first  
4   experience with alcohol was when you entered,  
5   after you entered the army? Or had you drunk,  
6   had you consumed alcohol before that?

7           INMATE HERNANDEZ: Yes, but not much like  
8   in a way I didn't --

9           PRESIDING COMMISSIONER DAVIS: Okay.

10          INMATE HERNANDEZ: Very, very little.

11          PRESIDING COMMISSIONER DAVIS: So it was  
12   in the army that you began to, well as abuse  
13   alcohol?

14          INMATE HERNANDEZ: Yeah.

15          PRESIDING COMMISSIONER DAVIS: In 1975 you  
16   married Ms. Garcia and while you were in the  
17   army, and you had one daughter?

18          INMATE HERNANDEZ: Yes.

19          PRESIDING COMMISSIONER DAVIS: Are you  
20   still married?

21          INMATE HERNANDEZ: No, sir.

22          PRESIDING COMMISSIONER DAVIS: No? When  
23   did that, when did that marriage end?

24          INMATE HERNANDEZ: Approximately seven  
25   years.

26          PRESIDING COMMISSIONER DAVIS: You  
27   staying, you stay in touch with your daughter?

1 INMATE HERNANDEZ: Yes, sir.

2 PRESIDING COMMISSIONER DAVIS: How, how do  
3 you stay in touch with her? Letters, phone  
4 calls?

5 INMATE HERNANDEZ: Yes, sir.

6 PRESIDING COMMISSIONER DAVIS: Okay.

7 Where does she live?

8 INMATE HERNANDEZ: She lives right now in  
9 El Paso, Texas.

10 PRESIDING COMMISSIONER DAVIS: So how  
11 often --

12 INMATE HERNANDEZ: (inaudible)

13 PRESIDING COMMISSIONER DAVIS: -- were you  
14 able, are you able to talk with her?

15 INMATE HERNANDEZ: Once a month.

16 PRESIDING COMMISSIONER DAVIS: How's she  
17 doing?

18 INMATE HERNANDEZ: She's doing fine.

19 PRESIDING COMMISSIONER DAVIS: What grade  
20 did you drop out of high school?

21 INMATE HERNANDEZ: Ninth grade.

22 PRESIDING COMMISSIONER DAVIS: The ninth  
23 grade? Why did you do that?

24 INMATE HERNANDEZ: It was during the  
25 summer, I got a job during the summer and I was  
26 getting a little money and I was saving up and I  
27 was, I was helping my, my mom and then it, it

1 just drove me from, from school.

2 PRESIDING COMMISSIONER DAVIS: Huh.

3 INMATE HERNANDEZ: I said why should I go  
4 back if I can make (inaudible). And then about a  
5 year and a half later after I was working then I  
6 tried to enlist in the, in the army so I can get  
7 some education.

8 PRESIDING COMMISSIONER DAVIS: So that was  
9 the purpose, you wanted to, you wanted to  
10 complete your education?

11 INMATE HERNANDEZ: That was one of the  
12 purposes.

13 PRESIDING COMMISSIONER DAVIS: Were you  
14 involved in any gang activity or anything at that  
15 time?

16 INMATE HERNANDEZ: No, sir.

17 PRESIDING COMMISSIONER DAVIS: No?

18 DEPUTY DISTRICT ATTORNEY TURLEY: Ever?

19 PRESIDING COMMISSIONER DAVIS: Ever?

20 INMATE HERNANDEZ: Never.

21 PRESIDING COMMISSIONER DAVIS: No never?

22 INMATE HERNANDEZ: No.

23 PRESIDING COMMISSIONER DAVIS: All right.

24 In terms of an arrest record, looks like you  
25 were, no juvenile history that is known. You're  
26 arrested by Los Angeles, LAPD in, on 1/8 of 1977  
27 for first-degree robbery. You pled guilty to, to

1 auto theft. You were placed on 36 months summary  
2 probation without supervision and ordered to pay  
3 a fine. What was, what was the, what were the  
4 circumstances of that?

5 INMATE HERNANDEZ: I -- I took a, a  
6 taxicab.

7 PRESIDING COMMISSIONER DAVIS: Okay.  
8 While the taxicab driver was in it?

9 INMATE HERNANDEZ: No. She just got, she  
10 got off --

11 PRESIDING COMMISSIONER DAVIS: Okay.

12 INMATE HERNANDEZ: -- and that's when I  
13 took the cab.

14 PRESIDING COMMISSIONER DAVIS: Okay. She  
15 got out and you got in and took the cab?

16 INMATE HERNANDEZ: Yeah.

17 PRESIDING COMMISSIONER DAVIS: Was it a  
18 (inaudible)? What'd you do that for?

19 INMATE HERNANDEZ: It, it was stupid now.  
20 I was drinking, we had been drinking that night  
21 and it was on a Saturday night I believe.

22 PRESIDING COMMISSIONER DAVIS: Okay. You  
23 needed a ride home?

24 INMATE HERNANDEZ: Actually I did have, I  
25 had money, I had enough money I could have paid  
26 for it.

27 PRESIDING COMMISSIONER DAVIS: Okay. How

1 much had you had to drink before you stole the  
2 cab?

3 INMATE HERNANDEZ: See I got to that  
4 party at about seven o'clock. I had quite,  
5 probably three.

6 PRESIDING COMMISSIONER DAVIS: So, and  
7 this is during the time, you're still in the army  
8 at this time?

9 INMATE HERNANDEZ: No. No, sir.

10 PRESIDING COMMISSIONER DAVIS: You were  
11 out of the army at this time?

12 INMATE HERNANDEZ: Yes.

13 PRESIDING COMMISSIONER DAVIS: Okay. And  
14 you're arrested in, on 4/26 of 1977 that actually  
15 be for the (inaudible) offense, but now in, this  
16 says in, in 1978 there was an arrest for, by the  
17 LAPD for shoplifting?

18 INMATE HERNANDEZ: Yes.

19 PRESIDING COMMISSIONER DAVIS: What was  
20 that about?

21 INMATE HERNANDEZ: I attempted to steal  
22 some glasses. Well, I did steal them.

23 PRESIDING COMMISSIONER DAVIS: Okay. And  
24 then another contact with LAPD for drinking in  
25 public?

26 INMATE HERNANDEZ: Yes, sir.

27 PRESIDING COMMISSIONER DAVIS: So just

1 the, the one incident where you actually, you  
2 received summary probation as well for the  
3 shoplifting, so you're placed in probation?

4 INMATE HERNANDEZ: Yes.

5 PRESIDING COMMISSIONER DAVIS: Was that --  
6 alcohol have anything to do with the shoplifting  
7 incident also?

8 INMATE HERNANDEZ: Yes.

9 PRESIDING COMMISSIONER DAVIS: So there  
10 was a thread running consistently through this?

11 INMATE HERNANDEZ: Yes.

12 PRESIDING COMMISSIONER DAVIS: What about  
13 drug use?

14 INMATE HERNANDEZ: I stay away from  
15 drugs.

16 PRESIDING COMMISSIONER DAVIS: So you  
17 (inaudible) that you smoked marijuana  
18 occasionally starting at age 19?

19 INMATE HERNANDEZ: Yes, sir.

20 PRESIDING COMMISSIONER DAVIS: But no  
21 other substances?

22 INMATE HERNANDEZ: No.

23 PRESIDING COMMISSIONER DAVIS: No  
24 cocaine, no methamphetamine? Nothing like that?

25 INMATE HERNANDEZ: Yes.

26 PRESIDING COMMISSIONER DAVIS: Just the  
27 alcohol? The alcohol, so be fair to say that

1 alcohol was drug of choice at that time?

2 INMATE HERNANDEZ: Yes, sir.

3 PRESIDING COMMISSIONER DAVIS: Is there  
4 anything that we haven't talked about, about the,  
5 the offense itself, your history prior to coming  
6 to the institution, your arrests, anything prior  
7 to the incident offense that, or actually the  
8 incident that your, actually prior to you coming  
9 to the institution, that we haven't talked about  
10 that you feel is important for this Panel to  
11 understand?

12 INMATE HERNANDEZ: I was arrested twice  
13 as a juvenile --

14 PRESIDING COMMISSIONER DAVIS: Okay.

15 INMATE HERNANDEZ: -- for truancy and I  
16 don't think that -- that that was mentioned.

17 PRESIDING COMMISSIONER DAVIS: Right.  
18 Right. I appreciate you bringing that up. And  
19 you were a truant, why?

20 INMATE HERNANDEZ: I just didn't want to  
21 go to school.

22 PRESIDING COMMISSIONER DAVIS: Just didn't  
23 want to go to school?

24 INMATE HERNANDEZ: (inaudible).

25 PRESIDING COMMISSIONER DAVIS: Did you  
26 get along all right in school?

27 INMATE HERNANDEZ: Yeah I, I did. It was

1 a (sic) inter, interracial at that time kind of a  
2 thing going on in school.

3 PRESIDING COMMISSIONER DAVIS: With just  
4 the --

5 INMATE HERNANDEZ: Majority blacks so  
6 real, real an interracial (sic). But it, I had no  
7 problems in school. As a matter of fact I kind  
8 of like it, but I kind of let influences, you  
9 know, of other people around.

10 PRESIDING COMMISSIONER DAVIS: Was it  
11 just your general peer group that was doing the  
12 influencing?

13 INMATE HERNANDEZ: Yeah. A few. But I  
14 was mostly interested in sports. But, yeah.

15 PRESIDING COMMISSIONER DAVIS: Had you  
16 been drinking prior to the incident offense?

17 INMATE HERNANDEZ: Yes, sir.

18 PRESIDING COMMISSIONER DAVIS: How much?

19 INMATE HERNANDEZ: Well, I got off of  
20 work, cashed my check. I had about six of those  
21 beers.

22 PRESIDING COMMISSIONER DAVIS: Okay.

23 INMATE HERNANDEZ: And --

24 PRESIDING COMMISSIONER DAVIS: Just you  
25 personally or were you sharing it with your  
26 friends?

27 INMATE HERNANDEZ: No. Just for me.

1           PRESIDING COMMISSIONER DAVIS:   Okay.

2           INMATE HERNANDEZ:   But the park that I  
3   went to there was persons there that I'd give  
4   them a beer.   Yeah.

5           PRESIDING COMMISSIONER DAVIS:   But you  
6   didn't drink a whole six-pack yourself?

7           INMATE HERNANDEZ:   No.   I must have given  
8   away three or four.

9           PRESIDING COMMISSIONER DAVIS:   Okay.   Was  
10   that, was that the, the extent that you're, that  
11   you'd been at work, you hadn't been drinking  
12   during the time you're at work?

13          INMATE HERNANDEZ:   No.

14          PRESIDING COMMISSIONER DAVIS:   Okay.   So  
15   you were drinking after work (inaudible) --

16          INMATE HERNANDEZ:   Yeah.   After my  
17   work --

18          PRESIDING COMMISSIONER DAVIS:   Three or  
19   four beers.

20          INMATE HERNANDEZ:   -- usually I would  
21   (inaudible) after I got off of work.   First thing  
22   I do is stop at a liquor store and buy, you know,  
23   a six pack or, at that time they had tall boys,  
24   maybe a couple of tall boys.

25          PRESIDING COMMISSIONER DAVIS:   Okay.   So  
26   in addition to a six-pack you had a couple of  
27   tall boys too?

1 INMATE HERNANDEZ: Yes.

2 PRESIDING COMMISSIONER DAVIS: Okay. So  
3 how would you describe your ability to make good  
4 judgments and so forth about the time that you  
5 were, decided to go and check on this property  
6 yourself?

7 INMATE HERNANDEZ: Very bad. I just, it  
8 was a bad, real bad (inaudible).

9 PRESIDING COMMISSIONER DAVIS: It almost  
10 seems like a pretty dangerous thing to have done  
11 to go into a neighborhood that you weren't  
12 familiar with and confront somebody about some  
13 property.

14 INMATE HERNANDEZ: Some (inaudible) it  
15 is, it was dangerous.

16 PRESIDING COMMISSIONER DAVIS:  
17 (inaudible).

18 INMATE HERNANDEZ: But at that time my  
19 reasoning was not, not of someone that's, you  
20 know, capable to understand the consequences.

21 PRESIDING COMMISSIONER DAVIS: The person  
22 that you were with that day, was he a gang  
23 member?

24 INMATE HERNANDEZ: No, sir.

25 PRESIDING COMMISSIONER DAVIS: Anything  
26 else that we haven't talked about that you feel  
27 is, is important for us to understand today?

1           INMATE HERNANDEZ: I don't understand  
2     that.

3           PRESIDING COMMISSIONER DAVIS: Is -- is  
4     there anything that we haven't covered that,  
5     that, anything about your, your past history,  
6     your family life, any other influences on you,  
7     things like that that you think would be  
8     important for us to, to review and --

9           INMATE HERNANDEZ: Oh.

10          PRESIDING COMMISSIONER DAVIS: -- and  
11     understand as we're going through all the  
12     information?

13          INMATE HERNANDEZ: Just that I've always  
14     tried, you know, to, to be the best I could. I  
15     was always protective of my family and the area  
16     that, that I live and where I come from -- one of  
17     the other reasons I went into the military is  
18     cause I didn't want to get involved with, you  
19     know, the atmosphere at that time going around  
20     the (inaudible) and I wanted to, to be the first  
21     one other than my sister to be able to help our  
22     family find a better place to -- to live. And I  
23     let everybody down because it's hard to do  
24     anything. That just became my --

25          PRESIDING COMMISSIONER DAVIS: How did  
26     you feel when they, when you were confronted with  
27     a gun the first time when he pointed the gun at

1 you and, and you had to leave?

2 INMATE HERNANDEZ: I felt scared  
3 personally when -- when he pulled the gun out.

4 PRESIDING COMMISSIONER DAVIS: How about  
5 after you'd already left? How'd you feel then?

6 INMATE HERNANDEZ: Felt anger and sort of  
7 like, well nobody does this to me, you know.

8 PRESIDING COMMISSIONER DAVIS: Feel  
9 insulted, disrespected?

10 INMATE HERNANDEZ: Yes, sir. Very much.  
11 So when my partner came with the idea of a gun I  
12 made, says let's go.

13 PRESIDING COMMISSIONER DAVIS: Any  
14 questions, Commissioner?

15 DEPUTY COMMISSIONER SMITH: Just that a  
16 question of -- of clarification. When  
17 Commissioner Davis asked you earlier -- earlier  
18 if your knew what kind of a gun it was, you --  
19 you said you didn't know. You thought it might  
20 have been nine millimeter?

21 INMATE HERNANDEZ: Yes.

22 DEPUTY COMMISSIONER SMITH: In, in the  
23 (inaudible) report when, when you were discussing  
24 the commitment offense you'd indicated that when  
25 you were in the army that you were trained with a  
26 .45 caliber?

27 INMATE HERNANDEZ: Yes, sir.

1           DEPUTY COMMISSIONER SMITH: And when in  
2 fact you had earned an expert badge --

3           INMATE HERNANDEZ: Yes, sir.

4           DEPUTY COMMISSIONER SMITH: -- in that  
5 weapon?

6           INMATE HERNANDEZ: Yes, sir.

7           DEPUTY COMMISSIONER SMITH: I'm a little  
8 confused by some one that would have earned an  
9 expert badge shooting a .45 caliber wouldn't know  
10 the difference between a nine millimeter, nine  
11 millimeter and a .45. I mean they're  
12 dramatically different.

13           INMATE HERNANDEZ: Of course. It wasn't  
14 a .45. I knew that. And the, the only reason it  
15 was a nine millimeter that I became aware of just  
16 through after the, you know, the arrest and all.

17           DEPUTY COMMISSIONER SMITH: Okay. So you  
18 knew what it wasn't, you weren't sure what it  
19 was?

20           INMATE HERNANDEZ: Yes.

21           DEPUTY COMMISSIONER SMITH: Okay. Great.  
22 I appreciate the clarification. Thank you.

23           PRESIDING COMMISSIONER DAVIS: Any further  
24 questions?

25           DEPUTY COMMISSIONER SMITH: No.

26           PRESIDING COMMISSIONER DAVIS: All right.  
27 I'll ask you to turn your attention, please, to

1 Commissioner Smith.

2 DEPUTY COMMISSIONER SMITH: (inaudible)  
3 to the C File you were received at the Department  
4 of Corrections on, on March 23<sup>rd</sup>, 1979. Received  
5 here at CTF on June 24<sup>th</sup>, 1998. You have a  
6 classification score of 19, which is the lowest  
7 classification score that a life inmate can  
8 attain. Your last hearing was held on January 6,  
9 2005. You received a one-year denial and that  
10 was your twelfth subsequent hearing. Since  
11 you've been incarcerated you generally had a  
12 positive adjustment history. You've had seven  
13 CDC 128A's, the last one being in December of  
14 2000 for disobeying staff. And I would have at  
15 that part frankly where although you only have  
16 seven 128's (inaudible) having been incarcerated  
17 for as long as you have been and you've gone  
18 through the number of parole hearings that you've  
19 gone, gone through that you would have, worked  
20 very hard to avoid even a 128. I mean although  
21 that's roughly five years ago, it's still  
22 relatively current. I'm a little surprised by  
23 that. You've had only four CDC 115's, and the  
24 last one being December of '98 and that was from  
25 mutual combat and, and three of the four 115's  
26 had to do with fighting or mutual combat, which  
27 was not simply you, you know, failing to report

1 for work or failing to follow instructions or, or  
2 something of that, that nature. You've received  
3 two certificates of completion in the Infectious  
4 Disease curriculum. One in Sexually Transmitted  
5 Infections and that's dated November of 2005.  
6 The other Hepatitis and that's dated February of  
7 2006. And you received a Certificate of  
8 Completion in Entrepreneurship, that was November  
9 of 2005. I haven't seen that before. What is  
10 that? What is the basis of that program?

11 INMATE HERNANDEZ: Oh it's to start  
12 getting into the, into the world of business and  
13 how to, the basics of starting a business.  
14 The -- the investment that you have to make.  
15 The -- the difference between a franchising and a  
16 sole -- sole proprietor, different aspects of --  
17 of a business.

18 DEPUTY COMMISSIONER SMITH: Okay. Yeah.  
19 As I said I hadn't seen that before. It sounds  
20 like, it was a potentially very valuable program.

21 INMATE HERNANDEZ: Oh, it is. Yes.

22 DEPUTY COMMISSIONER SMITH: You received  
23 ten Certificates of Achievement, Achievement for  
24 completion of FEMA (inaudible) courses.

25 INMATE HERNANDEZ: Uh-huh.

26 DEPUTY COMMISSIONER SMITH: They were all  
27 issued the same month.

1 INMATE HERNANDEZ: Yes.

2 DEPUTY COMMISSIONER SMITH: They were all  
3 issued July of 2005. Did you take them all  
4 during that month?

5 INMATE HERNANDEZ: No. What happened is  
6 that when, when I chose a course and then I have  
7 to wait for a book and then I sent them all at  
8 one time.

9 DEPUTY COMMISSIONER SMITH: Okay.

10 INMATE HERNANDEZ: And that's how it came  
11 in order to (inaudible) that. Because everything  
12 would have to stop on each one. So I was, I was  
13 keeping them all in --

14 DEPUTY COMMISSIONER SMITH: All at once?

15 INMATE HERNANDEZ: -- and then, then I  
16 sent them all at once.

17 DEPUTY COMMISSIONER SMITH: Okay. I knew  
18 there had to be a good reason. Because you got  
19 ten of them in this, all issued the, the same  
20 month same year. The -- the various programs  
21 were entitled Decision Making, Managing  
22 Volunteers, Leadership, Emergency Planning, State  
23 Disaster Management, Orientation to Disaster  
24 Exercises, Livestock and Disaster, Building for  
25 the Earthquakes of Tomorrow, Introduction Into  
26 Hazardous Materials and Functions of an Interview  
27 Program Manager.

1 INMATE HERNANDEZ: Yes, sir.

2 DEPUTY COMMISSIONER SMITH: You also  
3 participated in the Veterans' Self-help group  
4 from August 2004 to February 2005 and your BRAG  
5 Membership application was approved in April of  
6 2005. BRAG stands for Balance Re-entry Activity  
7 Group.

8 INMATE HERNANDEZ: Yes, sir.

9 DEPUTY COMMISSIONER SMITH: Is that an  
10 ongoing group?

11 INMATE HERNANDEZ: Yes.

12 DEPUTY COMMISSIONER SMITH: Okay. So  
13 you're still participating in that group?

14 INMATE HERNANDEZ: We have, right now  
15 because of staff shortages we're having a monthly  
16 meeting. If it wasn't for staff shortage, we  
17 would have at least bi-weekly meetings.

18 DEPUTY COMMISSIONER SMITH: Describe the  
19 program to us.

20 INMATE HERNANDEZ: The, the program is  
21 to, to help inmates coming into prison to get  
22 them adjusted into the different aspects of  
23 parole. To prepare them in education.  
24 Vocational wise through in self-study or through,  
25 through correspondence. Give them peer group  
26 help in the prison. Let them know that, that  
27 even though you're in prison you can help

1     yourself do whatever you, whenever your release  
2     comes and we have a lot of, lot of inmates that  
3     parole everyday and those are the ones that we,  
4     we usually get a hold of so we can be able to  
5     (inaudible). If we can help with our, with our  
6     own experience of being in prison and how in, in  
7     my, my case when I came to prison the, there was  
8     no inmate peer trying to help you to better  
9     yourself to be able to get out and I felt that  
10    the whole story here is of me in prison, had I  
11    known about the, that there were any programs  
12    like this and then they were going to help me out  
13    in understanding way back when I first came to  
14    prison instead of letting go two and three years  
15    by without doing it.

16           DEPUTY COMMISSIONER SMITH: Now, you, in  
17    reading a little bit about it you, you had to  
18    prepare an application and submit it for approval  
19    and acceptance?

20           INMATE HERNANDEZ: Yes, sir.

21           DEPUTY COMMISSIONER SMITH: Is that  
22    right?

23           INMATE HERNANDEZ: That's true.

24           DEPUTY COMMISSIONER SMITH: Sounds like  
25    it's --

26           INMATE HERNANDEZ: Only --

27           DEPUTY COMMISSIONER SMITH: -- it's not

1 an easy -- an easy program to become a part of;  
2 is that correct?

3 INMATE HERNANDEZ: (inaudible). You have  
4 to do it a team. You get a team to yourself and  
5 that's at least two persons vouching for your,  
6 you can't have no 115, no disciplinary. You have  
7 to have a good work record. You have to be sort  
8 of like an outstand still in prison.

9 DEPUTY COMMISSIONER SMITH: And you're on  
10 a number of waiting lists for a period of time.  
11 Are you still on waiting lists?

12 INMATE HERNANDEZ: Yes, sir.

13 DEPUTY COMMISSIONER SMITH: What -- what  
14 waiting lists are you on?

15 INMATE HERNANDEZ: Two. I got on one of  
16 the, it's a (inaudible) program that, that's  
17 known nationally. It's called Alternative  
18 Survivors and I'm on that waiting list and also  
19 on the Alcoholics Anonymous.

20 DEPUTY COMMISSIONER SMITH: Okay. So  
21 you're on those. Okay. Is it Narcotics  
22 Anonymous or Alcoholics Anonymous?

23 INMATE HERNANDEZ: Alcoholic Anonymous.

24 DEPUTY COMMISSIONER SMITH: Okay. And  
25 how long have you been on, on that waiting list?  
26 I would guess probably at least a year?

27 INMATE HERNANDEZ: Something like that.

1 Yeah. Because I'll be continuing (inaudible) yet  
2 and sometime like when we're locked down that  
3 would be like (inaudible) past three weeks some  
4 of the sponsors they sort of like lose interest  
5 and then we have to find another sponsor to be  
6 able to, to, to sponsor the (inaudible).

7 DEPUTY COMMISSIONER SMITH: You were  
8 assigned as a culinary clerk until July 2005 and  
9 then assigned to the receiving and release clerk.  
10 Are you still in that assignment?

11 INMATE HERNANDEZ: No, sir. I'm back in  
12 the culinary.

13 DEPUTY COMMISSIONER SMITH: When -- when  
14 did you go back in culinary?

15 INMATE HERNANDEZ: Six months ago.

16 DEPUTY COMMISSIONER SMITH: About the  
17 first of the year then?

18 INMATE HERNANDEZ: (inaudible).

19 DEPUTY COMMISSIONER SMITH: Okay.

20 INMATE HERNANDEZ: (inaudible).

21 DEPUTY COMMISSIONER SMITH: And doing  
22 clerk functions there in the culinary?

23 INMATE HERNANDEZ: Yes, sir. The same,  
24 the same job I did.

25 DEPUTY COMMISSIONER SMITH: You had a  
26 psychological evaluation. It's somewhat dated,  
27 it's July 23 of 2004 prepared by Dr. Hewchuk, H-

1 E-W-C-H-U-K. Before I go to that evaluation, are  
2 there any other activities that you've been  
3 involved in in the institution since your last  
4 hearing that I haven't addressed that we should  
5 be aware of?

6 INMATE HERNANDEZ: Yes. I'm taking now a  
7 business course through the Education Department.  
8 I have my, my credits. I've -- I signed up  
9 (inaudible) and now I'm doing Business Principles  
10 and Management. And I'm going on unit three,  
11 with an overall course average of 93.

12 DEPUTY COMMISSIONER SMITH: Good. And  
13 that's through the --

14 INMATE HERNANDEZ: The Educational --

15 DEPUTY COMMISSIONER SMITH: -- the  
16 Education Department?

17 INMATE HERNANDEZ: Yes.

18 DEPUTY COMMISSIONER SMITH: Okay. And  
19 when did you start that?

20 INMATE HERNANDEZ: In, I started that on,  
21 on 11/17/2005.

22 DEPUTY COMMISSIONER SMITH: Okay. Thank  
23 you. Anything else?

24 INMATE HERNANDEZ: No.

25 DEPUTY COMMISSIONER SMITH: Okay.

26 Because the, the psychological evaluation is  
27 somewhat dated and wouldn't have been used

1 (inaudible) from an assumption that it would have  
2 been used at your last hearing I'm going to  
3 identify only a couple of sections in what's a  
4 fairly brief evaluation to begin with. And then  
5 if there are any comments or any parts of the  
6 evaluation that you or Ms. Rutledge would like  
7 to, to add for the record I'll certainly give you  
8 that opportunity.

9 INMATE HERNANDEZ: Yes, sir.

10 DEPUTY COMMISSIONER SMITH: Running  
11 through the, the first page the, the doctor  
12 discusses basically your 115's. And it talks  
13 about the, the issue of alcohol abuse and, and  
14 that's been, I'm not going to go into detail  
15 there because we, we've addressed that with you  
16 being on the waiting list for Alcoholics  
17 Anonymous. But the doctor does write,

18 "That during your incarceration you've  
19 completed Vocational Programming and  
20 Television Production, Data Processing  
21 and Basic Electronics."

22 Is that --

23 INMATE HERNANDEZ: Yes, sir.

24 DEPUTY COMMISSIONER SMITH: That is  
25 accurate?

26 INMATE HERNANDEZ: Yes, sir.

27 DEPUTY COMMISSIONER SMITH: Okay.

1 And that the doctor concludes that,  
2 "Currently you are a suitable  
3 candidate for parole with these  
4 consideration with the recidivism  
5 and risk factor no greater than  
6 that of the average citizen in  
7 community."

8 He goes on to note that,  
9 "Due to your marketable skills and close  
10 family support it's expected that your  
11 transition to freedom and personal  
12 responsibility would be relatively  
13 smooth."

14 INMATE HERNANDEZ: Yes.

15 DEPUTY COMMISSIONER SMITH: Any comments  
16 or any other sections of that evaluation that you  
17 or Ms. Rutledge would like to address for the  
18 record?

19 ATTORNEY RUTLEDGE: I would. Yes. On  
20 page 1, third paragraph, it says his last violent  
21 based 115 occurred in 1998. Although Dr. Turedey  
22 (phonetic) in his previous report assessed inmate  
23 Hernandez,

24 "As low risk in a community setting.  
25 The Board expressed some concern  
26 about a pattern of, of poor violence  
27 based 115 during the 27-year period

1 of incarceration. A review of the  
2 actual 115 document is in the C-File  
3 and subsequent discussion with  
4 inmate Hernandez confirmed that each  
5 instance inmate Hernandez was the  
6 victim of an assault (inaudible) by  
7 another inmate reacted by defending  
8 himself. The recent CC policy  
9 classifying a majority of fights  
10 between inmates and mutual combat  
11 searched with further (inaudible).  
12 Actual issues of fact -- and he  
13 would -- part of it due to his  
14 remarkable skills in (inaudible)  
15 family support it is expected that  
16 his transition and freedom and  
17 personal responsibility would be  
18 (inaudible) tight."

19 Thank you.

20 DEPUTY COMMISSIONER SMITH: Anything  
21 else?

22 ATTORNEY RUTLEDGE: No, sir.

23 DEPUTY COMMISSIONER SMITH: Okay. Thank  
24 you. We're going to refer back again to the, the  
25 04 Board Report. Since the current Board Reports  
26 I believe referred this all back to that one.  
27 Under parole plans it indicates that you'd, you

1 plan on residing with your brother and sister-in-  
2 law who at that time lived in Pacoima.

3 INMATE HERNANDEZ: Yes, sir.

4 DEPUTY COMMISSIONER SMITH: We have a  
5 letter, which I'll address from your brother and  
6 sister-in-law shortly, but they now live Sylmar.

7 INMATE HERNANDEZ: Yes, sir.

8 DEPUTY COMMISSIONER SMITH: And then  
9 under employment indicates that you're confident  
10 that you can employ, that you can get employment  
11 with a Marco Sanchez who's a cousin?

12 INMATE HERNANDEZ: Yes.

13 DEPUTY COMMISSIONER SMITH: Who owns a  
14 body and fender mechanic shop in Rosemead and in  
15 the San Fernando Valley. This -- he owns two  
16 businesses?

17 INMATE HERNANDEZ: Yes. He, he owns --

18 DEPUTY COMMISSIONER SMITH: And that you  
19 would be employed by him to -- doing clerical  
20 duties.

21 INMATE HERNANDEZ: Yes.

22 DEPUTY COMMISSIONER SMITH: And the  
23 letter that, that we have, as I indicated is from  
24 your brother and sister-in-law. It stated that  
25 December 26, 2005, indicates that writing on your  
26 behalf they would welcome you into their home in  
27 Sylmar. And that, you know, they're well

1 established people because they're both employed.

2 Do you know what kind of a residence they  
3 have in Sylmar?

4 INMATE HERNANDEZ: Yeah. It's, and it's  
5 not, not considered a house and it's sort of  
6 like, I don't know how you would say, duplex I  
7 believe or something like that.

8 DEPUTY COMMISSIONER SMITH: Like a duplex  
9 or a townhouse?

10 INMATE HERNANDEZ: Something like that.

11 DEPUTY COMMISSIONER SMITH: Something  
12 like that? Something larger than an apartment?

13 INMATE HERNANDEZ: Yes. Something like,  
14 yes.

15 DEPUTY COMMISSIONER SMITH: Do you know  
16 how many bedrooms it has?

17 INMATE HERNANDEZ: I think they have two.  
18 I don't honestly --

19 DEPUTY COMMISSIONER SMITH: The, the  
20 reason I'm asking is that in, in the letter it  
21 indicates that beside your brother and his wife  
22 they also have three children.

23 INMATE HERNANDEZ: Yeah.

24 DEPUTY COMMISSIONER SMITH: So if you  
25 were residing there where would you, where would  
26 you sleep?

27 INMATE HERNANDEZ: Yeah. Good question.

1           DEPUTY COMMISSIONER SMITH: It's -- you  
2 know, I'm not discounting the, the value of the  
3 letter in terms of --

4           INMATE HERNANDEZ: I understand.

5           DEPUTY COMMISSIONER SMITH: -- your  
6 brother would like to offer you a residence.

7           INMATE HERNANDEZ: (inaudible). No. I'm  
8 just (inaudible) --

9           DEPUTY COMMISSIONER SMITH: But I'm, but,  
10 but I'm wondering just how --

11          INMATE HERNANDEZ: Exactly.

12          DEPUTY COMMISSIONER SMITH: -- realistic  
13 there is in the fact that such a five-person  
14 family already --

15          INMATE HERNANDEZ: Uh-huh.

16          DEPUTY COMMISSIONER SMITH: The other  
17 question I have is that if you were going to, and  
18 I'm not familiar with that, with that area  
19 geographically. If you were going to be  
20 residing, for the sake of conversation, in the  
21 Sylmar area --

22          INMATE HERNANDEZ: Yeah.

23          DEPUTY COMMISSIONER SMITH: -- how far is  
24 that from Rosemead or San Fernando Valley?

25          INMATE HERNANDEZ: To Rosemead, I'd said  
26 a good drive.

27          DEPUTY COMMISSIONER SMITH: (inaudible).

1 Sometimes a good drive is on a sunny Sunday  
2 afternoon and --

3 INMATE HERNANDEZ: Yeah.

4 DEPUTY COMMISSIONER SMITH: -- sometimes  
5 it's in commute driving?

6 INMATE HERNANDEZ: Yeah. This, it, it is  
7 a long commute. It's going to be a long commute  
8 for the I believe, you know, first four weeks  
9 till I get established. And then I -- I have a  
10 plan also to be able to apply under the Veterans'  
11 Assets, which it's going to help me under, for to  
12 be able to find a larger place, you know,  
13 hopefully, you know, I can use my GI Bill to be  
14 able to get a down payment for a home being that  
15 my brother's working, and he's also a Veteran,  
16 and so these are, these are the things that I  
17 have sort of looked at and be able to make it.

18 DEPUTY COMMISSIONER SMITH: And have you  
19 contacted the VA regarding those benefits would  
20 be available to you?

21 INMATE HERNANDEZ: I have. Yes, I have.

22 DEPUTY COMMISSIONER SMITH: Okay.

23 INMATE HERNANDEZ: I have letters from  
24 them and I have all of the, they sent me a, a  
25 whole packet of the (inaudible).

26 DEPUTY COMMISSIONER SMITH: So what's  
27 the, what's the most recent letter? Because

1 those are letters that, that this Panel, as past  
2 Panels, you know, should be aware of.

3 INMATE HERNANDEZ: And I, and I didn't  
4 bring the copy of that letter. But I'll, I'll be  
5 glad to, I, I can show you the latest one that I  
6 have. I think it's, it's about a year old that,  
7 that was on - I don't want to take much of your  
8 time.

9 DEPUTY COMMISSIONER SMITH: No. We,  
10 this, this is an extremely important hearing.  
11 You have all the, all the time that you need.

12 INMATE HERNANDEZ: I don't have it, but I  
13 can get in touch with them because the GI Bill I  
14 think, I understand it to be, has changed since I  
15 think after I think '82. And in the time that,  
16 that I served was during the Viet Nam era time,  
17 which means that all my benefits are different  
18 than the benefits that are now given. And in,  
19 and in mine a lot of them are still there. The  
20 only, the only one that expired during my  
21 incarceration was the education benefit that I  
22 had. That only lasted ten years and, and I'm  
23 assuming that expired. But that's the only  
24 benefit that's, that, that has expired since I've  
25 been in prison. The home loan, the 1980 I  
26 believe, 1986 Veterans' Benefit Bill that passed  
27 by President, I believe it was, I forget the

1 President, but I recall --

2 DEPUTY COMMISSIONER SMITH: (inaudible).

3 INMATE HERNANDEZ: -- that it was, it  
4 was, this was to help the Veterans that were  
5 homeless and the persons that were, that were  
6 also coming out of prison or that needed help in  
7 adjustment that that was also going to be  
8 beneficial to us.

9 DEPUTY COMMISSIONER SMITH: Some --  
10 something that, that I'm curious about, you know,  
11 the, you know this is your 13<sup>th</sup> subsequent  
12 hearing.

13 INMATE HERNANDEZ: Seventeen.

14 DEPUTY COMMISSIONER SMITH: No. We had  
15 your 12<sup>th</sup> was in '05. So this, this is your 13<sup>th</sup>  
16 subsequent hearing. So you had one initial,  
17 which was 14 and you probably had a couple of  
18 document, documentation hearings prior to that.

19 INMATE HERNANDEZ: Well, when I came in  
20 at the time I never had a document, I had one  
21 documentation in '80, in '80 --

22 DEPUTY COMMISSIONER SMITH: Well, my  
23 point is that, that I'm sure at least, if not in  
24 every one of those instances the, in the majority  
25 of those instances you would have been counseled  
26 on how important it is to have letters of support  
27 for residence, employment, from family and

1 friends and so forth.

2 INMATE HERNANDEZ: Yes.

3 DEPUTY COMMISSIONER SMITH: And you have,  
4 you know, a very positive letter from your  
5 brother.

6 INMATE HERNANDEZ: Yes.

7 DEPUTY COMMISSIONER SMITH: You know,  
8 certainly some, some questions with regard to the  
9 viability of the residential plan that we've  
10 already addressed. But there's no employment  
11 letters.

12 INMATE HERNANDEZ: Yes.

13 DEPUTY COMMISSIONER SMITH: And, and I'm  
14 wondering why.

15 INMATE HERNANDEZ: Prior to '88 I used to  
16 always get letters, a lot of letters, a lot of  
17 jobs, opportunity. I was found suitable in 1988  
18 and then on review it was --

19 DEPUTY COMMISSIONER SMITH: Yeah. But,  
20 but we're talking now. We're talking now 2006.

21 INMATE HERNANDEZ: Well I'm getting, I'm  
22 getting there.

23 DEPUTY COMMISSIONER SMITH: Okay. Well I  
24 don't want to roll the clock back for 20 years.

25 INMATE HERNANDEZ: Okay.

26 DEPUTY COMMISSIONER SMITH: But I want to  
27 talk about right now, because it, because it's

1 right now that's critical to you.

2 INMATE HERNANDEZ: Exactly. I understand  
3 that. And my reason was that every year that I  
4 come to this hearing my family, the person that I  
5 love, used to get their hopes up high, real high.  
6 And being that in 1990 I received a, I was  
7 (inaudible) received a, a release date and I held  
8 that for two years. They had me coming home  
9 already and then, you know, the extension period  
10 and it was taken away and ever since then I kind  
11 of like that, that I wasn't going to put them  
12 through this again. My grandmother died during  
13 (inaudible) time and, you know, I, I (inaudible),  
14 you know why should I be bothering them people  
15 out there if I'm not never going to get out.

16 DEPUTY COMMISSIONER SMITH: Well, I -- I  
17 understand your, your point of courtesy and  
18 certainly we're a long way from making a decision  
19 about whether or not we're going to find you  
20 eligible today.

21 INMATE HERNANDEZ: Right.

22 DEPUTY COMMISSIONER SMITH: But you need  
23 to understand that if, if you don't have all the  
24 I's dotted and all the, the T's crossed that to  
25 an extent you may be handcuffing the Board. And  
26 again, you know, because of, of the number of  
27 hearings you've had and, you know, other past

1 letters, you know, we'll certainly discuss those  
2 at the recess, so I'm not suggesting that, you  
3 know, we're not, not going to grant at this  
4 point, because again I, I have no idea. But you  
5 need to understand at the very least that by not  
6 establishing parole plans, your residence and  
7 employment and getting the kinds of letters that  
8 may get other people's hopes up that you tend to  
9 handcuff the Panels. And you're not doing  
10 yourself the service; you're doing yourself a  
11 disfavor. You need to understand that. I'm sure  
12 you've heard that before.

13 INMATE HERNANDEZ: Yes, I have.

14 DEPUTY COMMISSIONER SMITH: But some,  
15 some things bear repeating.

16 INMATE HERNANDEZ: Yes, sir. I, I  
17 appreciate it.

18 PRESIDING COMMISSIONER DAVIS: We'll take  
19 a short recess.

20 DEPUTY COMMISSIONER SMITH: Yes.

21 R E C E S S

22 DEPUTY COMMISSIONER SMITH: And the  
23 previously identified is back in the hearing  
24 room.

25 PRESIDING COMMISSIONER DAVIS: All right.  
26 I appreciate everyone's indulgence. It was  
27 getting a little stuffy in here for me. So I've

1 also given everyone permission to shed their  
2 coats if that's all right with you Mr. Hernandez.

3 INMATE HERNANDEZ: Oh, yes.

4 PRESIDING COMMISSIONER DAVIS: We don't  
5 want to seem to informal to you, but --

6 INMATE HERNANDEZ: Sure.

7 PRESIDING COMMISSIONER DAVIS: -- it, it  
8 sure does get very stuff very quickly, so -- All  
9 right. With that we'll resume where we left off.

10 DEPUTY COMMISSIONER SMITH: So we also,  
11 also sent out what are known as 3042 notices.  
12 Those are letters that go out to the various  
13 Criminal Justice Agencies that were involved in  
14 your commitment offense. We didn't receive any  
15 responses back to those notices, although you do  
16 have Mr. Turley here representing the Los Angeles  
17 County District Attorney's Office and he'll be  
18 participating in the hearing in just a few  
19 moments. Before I return to Commissioner Davis  
20 is there any, any comments that you'd like to  
21 make with regard to your parole plans that I  
22 haven't addressed?

23 INMATE HERNANDEZ: No.

24 DEPUTY COMMISSIONER SMITH: Okay. Thank  
25 you.

26 INMATE HERNANDEZ: (inaudible).

27 DEPUTY COMMISSIONER SMITH: Commissioner.

1           PRESIDING COMMISSIONER DAVIS: Tell me  
2 about your participation in AA. How, what, what  
3 kinds of things have you found (inaudible) in  
4 there?

5           INMATE HERNANDEZ: AA means, it's a grave  
6 tool for a person that's in need of, of help  
7 dealing with alcoholism. It made me realize that  
8 I can enjoy some activities without, without  
9 drinking alcohol. It made me realize that I  
10 missed a lot of special events by drinking  
11 alcohol. I can remember in one day that my  
12 sister brought pictures of the wedding. I could  
13 never, I couldn't remember the wedding. I  
14 couldn't remember the members that participated  
15 in the wedding. And because I was always  
16 drinking. And it made me realize that it's also  
17 detrimental to your health. Especially as you  
18 get older. It does a lot of damage to your  
19 liver.

20           PRESIDING COMMISSIONER DAVIS: You  
21 consider yourself to be an alcoholic?

22           INMATE HERNANDEZ: Yes, sir.

23           PRESIDING COMMISSIONER DAVIS: Is that a  
24 life-long issue for you?

25           INMATE HERNANDEZ: Yes, it is going to be  
26 a life long issue.

27           PRESIDING COMMISSIONER DAVIS: What

1 things have you had to plan for your ultimate  
2 release in terms of identifying AA programs on  
3 the outside?

4 INMATE HERNANDEZ: I know that in  
5 anywhere, in any city, I can dial 1-800-AA and  
6 I'll get a, a sponsor on the line that's going to  
7 help me. There are thousands and thousands of  
8 organizations dealing with Alcohol Anonymous.  
9 Not only for the alcoholic, but also for the  
10 family members, because they too I believe suffer  
11 and --

12 PRESIDING COMMISSIONER DAVIS: All right.  
13 Commissioner, any questions that you might have?

14 DEPUTY COMMISSIONER SMITH: No.

15 PRESIDING COMMISSIONER DAVIS: Mr.  
16 Turley, questions?

17 DEPUTY DISTRICT ATTORNEY TURLEY: Just a  
18 couple. I kind of missed something. What  
19 periods was, was the inmate actively  
20 participating in AA?

21 PRESIDING COMMISSIONER DAVIS: Do you know  
22 when you were participating in AA what years?

23 INMATE HERNANDEZ: I believe it's going  
24 on two years right now on, on the waiting list.

25 PRESIDING COMMISSIONER DAVIS: Well two  
26 years on the waiting list, but prior to that what  
27 was your, were you actively participating in AA

1 prior to that?

2 INMATE HERNANDEZ: Not AA, but there was  
3 a, a span of time that I had stopped  
4 participating for what, (inaudible) AA. That  
5 being the last, the last chrono that I have there  
6 is from, should be on, on my, on my file. Right  
7 before, before I got here in '89. No. '98. You  
8 have on your list '98?

9 PRESIDING COMMISSIONER DAVIS: You got  
10 here in '98.

11 INMATE HERNANDEZ: When I got here.  
12 Thank you.

13 DEPUTY DISTRICT ATTORNEY TURLEY: And how  
14 long have you participated in AA?

15 PRESIDING COMMISSIONER DAVIS: In total  
16 how long have you participated in AA?

17 INMATE HERNANDEZ: Oh. Since '79.

18 PRESIDING COMMISSIONER DAVIS: Okay.

19 DEPUTY DISTRICT ATTORNEY TURLEY: When  
20 was it that the inmate first admitted to his  
21 guilt in this offense to the authorities?

22 PRESIDING COMMISSIONER DAVIS: Do you  
23 understand the question?

24 INMATE HERNANDEZ: Yes.

25 PRESIDING COMMISSIONER DAVIS: Okay.

26 INMATE HERNANDEZ: I admitted to this  
27 crime during a session that my (inaudible) that

1 that I mastered the therapy that they had me do.  
2 During that group, so possibly five or six  
3 persons that have to talk about the crime and  
4 have to admit that you commit the crime. And  
5 that was, I was, I was believe number four or  
6 five and as I heard each person I felt a lot of  
7 guilt and that was the first time that I, that I  
8 voiced (inaudible) as it happened and, and  
9 admitted to, admitted to, to committing this,  
10 this offense.

11 PRESIDING COMMISSIONER DAVIS: And what  
12 year was that?

13 INMATE HERNANDEZ: I think it was '88.  
14 Or '87.

15 DEPUTY DISTRICT ATTORNEY TURLEY: No  
16 further questions.

17 PRESIDING COMMISSIONER DAVIS: All right.  
18 Ms. Rutledge?

19 ATTORNEY RUTLEDGE: Just a question too.  
20 I wanted to just review some of the skills that  
21 you've learned since you've been in prison. You  
22 worked as a clerk?

23 INMATE HERNANDEZ: Yes.

24 ATTORNEY RUTLEDGE: How many years did  
25 you put in as a clerk all together, do you think,  
26 in prison?

27 INMATE HERNANDEZ: This time (inaudible)

1 say roughly '79 and I've done nothing but  
2 clerical except for some time that I spent doing  
3 vocational courses. I've always -- I always have  
4 classes.

5 ATTORNEY RUTLEDGE: Did you complete  
6 (inaudible)?

7 INMATE HERNANDEZ: Yeah. Data  
8 Processing.

9 ATTORNEY RUTLEDGE: Did that help your  
10 typing or what did you learn in the Data  
11 Processing?

12 INMATE HERNANDEZ: It showed me to  
13 manipulate difference softwares. It showed me a  
14 different aspect of computer hardware and how to  
15 maintain records, things that are needed in the  
16 clerical environment.

17 ATTORNEY RUTLEDGE: All right. And you,  
18 what other jobs have you held at the prison that  
19 taught you skills that would, you could use to be  
20 employed on the outside?

21 INMATE HERNANDEZ: Oh I think I've been  
22 a -- I've been a -- I'm trying to remember the --  
23 the title.

24 ATTORNEY RUTLEDGE: Okay. (inaudible).

25 INMATE HERNANDEZ: I did all the, I typed  
26 all of the, the, the invoices for purchasing. I  
27 was a purchasing clerk at the hospital, T and C.

1 I dealt with the purchasing orders and then  
2 receiving and then we used clerical dealing with  
3 different aspects of, of maintaining the, the  
4 supplies. (inaudible) the culinary, on the  
5 culinary (inaudible). And I, I maintained a  
6 database on all the culinary workers. I did the  
7 payroll. I, I prepared the lists for the  
8 (inaudible) so they can come to work. It's been,  
9 then I worked as at different job positions.

10 ATTORNEY RUTLEDGE: All right. Any other  
11 skill? You were loading docks before you  
12 (inaudible) at that?

13 INMATE HERNANDEZ: Yes.

14 ATTORNEY RUTLEDGE: And you got your --  
15 your speech thing for an auto accident?

16 INMATE HERNANDEZ: Yes, ma'am.

17 ATTORNEY RUTLEDGE: All right. No  
18 further questions.

19 PRESIDING COMMISSIONER DAVIS: All right.  
20 Thank you. Mr. Turley, (inaudible).

21 DEPUTY DISTRICT ATTORNEY TURLEY: Thank  
22 you. The, very long-standing conventional list  
23 in, you know, things you just said. Perhaps the  
24 very best school to teach maturity and  
25 responsibility is military service. And this  
26 inmate had the benefit of that school for about  
27 three and a half years. And apparently he was a

1 poor student. Almost immediately after getting  
2 out of the army rather than having learned  
3 responsibility, rather than learn the, the  
4 lessons of growing up, take control of himself,  
5 keeping his nose clean and holding a good job he  
6 seemed to learn irresponsibility and the only  
7 meaningful experience that based on what we've  
8 heard today evolved from the army was that he  
9 came out of the army with a substantial amount of  
10 experience in how to handle a handgun. The  
11 particular, the underlying offense here was  
12 again, part of, of a pattern of, of the events  
13 that were criminal tied to alcohol. He was out  
14 of the army a very short time, stole a taxicab  
15 and then in less than a year after he got out of  
16 the army he committed this offense. By his own  
17 admission fails to discuss what he believes was a  
18 burglary with the police and decides to take  
19 things into his own hand. He was confronted by a  
20 person, makes him angry, he's got a few beers  
21 under his belt, he goes off, gets a gun, comes  
22 back and without seeing (inaudible) over anything  
23 else shoots another person right through the  
24 heart. Killed him dead. Chases two others and  
25 shoots at them. Then for an additional period,  
26 approximately eleven years of so by this  
27 statement, eleven or twelve years, he still

1 refuses even to admit to the authorities his own  
2 guilt in the matter. And that's, it's  
3 commendable that he finally got around to that,  
4 but this is a very serious crime, took a person's  
5 life, didn't seem to give it any, any thought at  
6 all. Walked up to a person virtually at point  
7 blank range and shoots him through the heart and  
8 (inaudible) to that offense alone is the  
9 appropriate for denial of parole. At the time  
10 that he committed this offense, again he was 23  
11 years old. He'd had substantial experience with  
12 law enforcement agencies due to his own  
13 activities. Highly improbable that he didn't  
14 recognize that it was unlawful for him to even be  
15 in possession of the firearm. And he -- he made  
16 a concerted effort went, went right to the heart  
17 of the matter indications criminal behavior. I  
18 think that for all these reasons, but primarily  
19 focusing on the, on his failure to, to learn the  
20 lessons of life at an age when he should have  
21 been completely mature he engaged in this, this  
22 offense for a very trivial reason showing no  
23 regard to human life and killed another person  
24 in, (inaudible) a sheer act of callous disregard  
25 for human life. And the people would recommend  
26 that parole be denied at this time. Thank you  
27 very much.

1           PRESIDING COMMISSIONER DAVIS: Thank you.  
2 Thank you. Ms. Rutledge?

3           ATTORNEY RUTLEDGE: Thank you. Mr.  
4 Hernandez is 52 years old; is that correct?

5           INMATE HERNANDEZ: Fifty-one.

6           ATTORNEY RUTLEDGE: Fifty-one. He's 51  
7 years old. At the time this commitment offense,  
8 which was 29 years ago, is that right? The  
9 offense in itself --

10          INMATE HERNANDEZ: Yes, ma'am.  
11 (inaudible).

12          ATTORNEY RUTLEDGE: -- was in 1977. He  
13 was 23? Twenty-four, twenty-three?

14          INMATE HERNANDEZ: Yes.

15          ATTORNEY RUTLEDGE: Twenty-three years  
16 old. A lot of time, I mean this is a crime  
17 that's nearly 30 years old. So as far as, as,  
18 him serving his time it's definitely met. He, in  
19 those 30 years he had four 115's? Yeah. I think  
20 it's four. I'm just going to look refer to that.  
21 And --

22          DEPUTY COMMISSIONER SMITH: That's  
23 correct, Counselor. It's four.

24          ATTORNEY RUTLEDGE: It's four. And they  
25 were all; they all had big spans I want to note.  
26 There were seven years from '83 to '90. Four  
27 years. Got another one in '94. Four more years.

1 So it, it wasn't like he was, you know, racking  
2 them up one a year or one every other year.  
3 There was just a significant amount of time that  
4 transpired between each one. And the last one  
5 being more than eight years ago. And I think  
6 that, and prior to him coming here he didn't  
7 really have a consistent record of any kind of  
8 violence. It sounds to me like when he went to  
9 the military he learned how to shoot guns. He  
10 probably wouldn't have felt this confident that  
11 day with a gun. I mean I -- I was amazed to take  
12 a gun that you, and never tried to shoot it  
13 first, you know, unless you've got some kind of  
14 skill in, in that regard. This was a situational  
15 circumstance where he just applied poor judgment  
16 for whatever reason. But that again was almost  
17 30 years ago. Today he's -- he's complied with  
18 everything in the system that he's been asked to  
19 do. In fact, there's an, there's an old Board  
20 Report I'll pull up where it was dated 1987, his  
21 counselor at that time said that he'd been  
22 complying with the Board of Prison, at that time  
23 the Board of Prison Terms and Recommendations, he  
24 remained disciplinary free, he upgraded  
25 vocationally, participated in self-help, there's  
26 lots of Board Reports that indicated a  
27 participation and there was, he did another AB

1 Substance Abuse, and another course. He'd done  
2 countless self-help groups. More recently some  
3 prison fellowship work in fact a few years ago.  
4 He has college courses. He completed his  
5 (inaudible). Lots of (inaudible) chronos for his  
6 different jobs he's had throughout the years and  
7 I want to, I think the, the two main things  
8 about, about him today are one, he meets the  
9 suitability factors completely. He's got  
10 marketable skills, he has a place to live with  
11 family members who know him in LA County upon his  
12 release. Second, he's been found suitable twice.  
13 Two different Boards, two years apart, found Mr.  
14 Hernandez suitable and other Boards too have  
15 referred him to, you know, I guess to (inaudible)  
16 commitment offense to, sent him back for psyches  
17 and he did fine. He did fine in the Cat X  
18 program. Going back to '87 he got a great psych  
19 report.

20 "The probability of him committing a  
21 violent act is considerably reduced  
22 from what it was at the time of his  
23 arrest and there was a high  
24 probability that he could complete a  
25 course of parole without incident.  
26 He has the capacity to make a good  
27 occupational and social adjustment

1           on release."

2           That's '87. And then moving up to '99  
3 he, he, on, on the diagnostic impressions he had  
4 no personality disorder. He had a gap of '90.  
5 His prognosis is very positive for being able to  
6 maintain his current mental (inaudible) in the  
7 community upon parole. And then review of the  
8 life crime is that he understood several of the  
9 key factors, which favorable of the crime. He  
10 acknowledged that he deserves whatever punishment  
11 will come to him for his actions. He stated it  
12 was never his intention to kill anyone. I  
13 believe this inmate showed above average  
14 understanding that why this crime occurred and  
15 the appropriate and genuine amount of remorse.  
16 And then, then up to a recent psyche report,  
17 which you reviewed. So over decades he'd gotten  
18 good psyche reports. Again he's been found  
19 suitable twice and he's complied with everything,  
20 as far as suitability factors goes. He meets all  
21 of them. And he has, again, nearly 29 years in.  
22 So all of those things considered, I would ask  
23 the Board to give him a parole date today. And,  
24 and I would note too that because he's been found  
25 suitable twice I would also ask the Board to set  
26 a term. Because I believe that the, the, under  
27 the law that he was sentenced under when he's

1 found suitable a term is supposed to be set.

2 PRESIDING COMMISSIONER DAVIS: Okay.

3 Thank you. Mr. Hernandez, now it's your  
4 opportunity to address the Panel directly and  
5 tell us why you believe that you are suitable for  
6 parole.

7 INMATE HERNANDEZ: Yes' sir. My thoughts  
8 right now are running past me right now, but I  
9 have to say that I don't blame nobody for  
10 committing this crime, because I, I'm very sorry  
11 for it. And I was (inaudible) it's been this  
12 long. I feel, and I beg for, another chance just  
13 to, to live this remaining years that I probably  
14 have with my family. And I wish then that, that  
15 I probably have no right to, to ask for this.  
16 And, and I know that this time that I've done  
17 here is not going to be compared to, to finally  
18 when I reach the judgment when I (inaudible). So  
19 that's --

20 PRESIDING COMMISSIONER DAVIS: All right.

21 Thank you very much, sir.

22 DEPUTY COMMISSIONER SMITH: Thank you.

23 PRESIDING COMMISSIONER DAVIS: We'll now  
24 recess for deliberation.

25 R E C E S S

26 --oOo--

27

## 1 CALIFORNIA BOARD OF PAROLE HEARINGS

## 2 D E C I S I O N

3 DEPUTY COMMISSIONER SMITH: For the  
4 record, everyone previously identified is back in  
5 the hearing room.

6 PRESIDING COMMISSIONER DAVIS: This is the  
7 matter of Peter Hernandez, CDC number C-03015.

8 In a review of all information received from the  
9 public and relied on the following circumstances  
10 in concluding the prisoner is not suitable for  
11 parole, he would pose a reasonable risk of danger  
12 to society or a threat (inaudible) he was in  
13 prison we come to this conclusion by the  
14 commitment offense that was committed in a  
15 special callous manner. There were multiple  
16 victims attacked (inaudible) one was killed in  
17 the same incident. The motive for the crime was  
18 very (inaudible) in relation to the offense.

19 These conclusions were drawn from the Statement  
20 of Fact wherein the prisoner as to what he  
21 describes as an attempt to recover stolen  
22 property where he was threatened by what he  
23 describes as an armed person. He sought out a  
24 weapon, put himself back into a dangerous  
25 situation, confronted the person who may or may  
26 not have been involved in the theft of his

27 P. HERNANDEZ C-03015 DECISION PAGE 1 7/13/06

1 sister's property and without seeing a weapon or  
2 any (inaudible) and threat he used this, he used  
3 his own weapon to shoot and kill the victim then  
4 turned the weapon on to the victims' two  
5 companions shooting at them, striking them in the  
6 leg. We find there is basically a pattern of  
7 criminal conduct and a failure to prophet from  
8 the society previous attempt to correct  
9 criminality specifically adult probation. In  
10 regard to institutional behavior we find that  
11 there are seven 128A counseling chronos, the last  
12 of which was in December of 2000, and four  
13 serious 115 disciplinary (inaudible), the last of  
14 which was in February of 1998. The Psychological  
15 Report of July of 2004 by Dr. (inaudible) is  
16 supportive and the, with regard to parole plans,  
17 we find that the parole plans are not realistic.  
18 There is, there, there is virtually no employment  
19 plan, there's no support of even employment  
20 information by statements that there are some  
21 distance, there's no real plan though. And your  
22 residential plans of sharing a two-bedroom  
23 residence with two adults and three the children  
24 seems suspect. Now I say that understanding that  
25 if that's the option then what you need to do is  
26 come back in here with an

1 explanation that, yes, we understand it's going  
2 to be tight, we thought about this. We'll put a  
3 cot up in the living, we're going to partition  
4 off, what, whatever it is. If that's the case  
5 then, then let us know that. And that's where  
6 you need to, that's where you need to focus your  
7 work. I understand and appreciate that at some  
8 point in time you became embarrassed or, or you  
9 didn't want to burden your family more with, with  
10 denial after denial. I understand. But the  
11 thing of it is this is a critical part of this  
12 and there's -- you could earn a date, but this  
13 has to be part of your earning that date. So you  
14 need to spend this, this time now in figuring out  
15 your parole plan. Get a job offer. You have  
16 skills, there's no reason why you can't get a job  
17 offer out there, or at least something lined up.  
18 Do some research to determine where you can find  
19 a job given the skills that you have. And let  
20 your family help you.

21 INMATE HERNANDEZ: Okay, sir.

22 PRESIDING COMMISSIONER DAVIS: It's not  
23 that difficult for them to do that. The, with  
24 regard to the 3032 notices. The District  
25 Attorney from Los Angeles County is here in  
26 person by representative because (inaudible)

27 P. HERNANDEZ C-03015 DECISION PAGE 3 7/13/06

1 parole. Nonetheless we want to commend you for  
2 several things. Your 2005 Certificate for your  
3 Entrepreneur of the workshop, your ten FEMA  
4 Certificates including lessons in Leadership and  
5 Planning, your Veterans Support Group of eight,  
6 from eight of 2004 and two of 2005, your two  
7 Health Certificates, Certificates of Achievement,  
8 your work as a culinary clerk and as a receiving  
9 clerk and then back again as a culinary clerk,  
10 your work in the BRAG Group helping the new  
11 inmates requiring an application process and  
12 recommendation. You should be very proud of  
13 that.

14 INMATE HERNANDEZ: Thank you.

15 PRESIDING COMMISSIONER DAVIS: That's a  
16 significant achievement to have to apply for  
17 something, to have to work on, you had to work to  
18 get that, that wasn't just something you could  
19 say yeah, I'll do that. You had to (inaudible)  
20 on a record. Put that same effort into your  
21 parole plans. And we appreciate the fact that  
22 you're on the AA waiting list and that you're on  
23 the waiting list for Alternatives to Violence, as  
24 well as starting a new business course as of  
25 November of '05.

26 INMATE HERNANDEZ: Yes, sir

27 P. HERNANDEZ C-03015 DECISION PAGE 4 7/13/06

1 I'm going to live out there (inaudible).

2 DEPUTY COMMISSIONER SMITH: You, you have  
3 about a year to, to do that.

4 INMATE HERNANDEZ: Yes, sir.

5 DEPUTY COMMISSIONER SMITH: You know,  
6 bring in the, the VA --

7 INMATE HERNANDEZ: Yes, sir.

8 DEPUTY COMMISSIONER SMITH: -- letters,  
9 that information so we can present that and have  
10 those documents. You can't bring in too much  
11 documentation. You can only bring in too little.  
12 Okay?

13 PRESIDING COMMISSIONER DAVIS: Take a  
14 lesson from your Entrepreneurial class thinking  
15 you're developing a business plan.

16 INMATE HERNANDEZ: Yes, sir. That's what  
17 I'll (inaudible).

18 PRESIDING COMMISSIONER DAVIS: There you  
19 go.

20 INMATE HERNANDEZ: Thank you very much  
21 for --

22 DEPUTY COMMISSIONER SMITH: We wish you,  
23 we wish you good luck sir.

24 PRESIDING COMMISSIONER DAVIS: All right.  
25 (inaudible). Ms. Rutledge, thank you.

26 ATTORNEY RUTLEDGE: (inaudible)

27 P. HERNANDEZ C-03015 DECISION PAGE 8 7/13/06

78

1                   PRESIDING COMMISSIONER DAVIS:   Mr.

2   Turley, thank you.

3                   ATTORNEY RUTLEDGE:   Oh, it's my pleasure.

4                   ADJOURNMENT

5                   --oOo--

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23   PAROLE DENIED ONE YEAR

24   THIS DECISION WILL BE FINAL ON: \_\_\_\_\_

25   YOU WILL BE PROMPTLY NOTIFIED IF, PRIOR TO THAT

26   DATE, THE DECISION IS MODIFIED

27   P. HERNANDEZ C-03015 DECISION PAGE 9 7/13/06

CERTIFICATE AND  
DECLARATION OF TRANSCRIBER

I, PATTY L. DURAN, a duly designated transcriber, NORTHERN CALIFORNIA COURT REPORTS, do hereby declare and certify under penalty of perjury that I have transcribed tape(s) which total one in number and cover a total of pages numbered 1 through 78, and which recording was duly recorded at the CORRECTIONAL TRAINING FACILITY, in SOLEDAD, CALIFORNIA, in the matter of the SUBSEQUENT PAROLE CONSIDERATION HEARING of PETER HERNANDEZ, CDC No. C-03015, on JULY 13, 2006, and that the foregoing pages constitute a true, complete, and accurate transcription of the aforementioned tape(s) to the best of my ability.

I hereby certify that I am a disinterested party in the above-captioned matter and have no interest in the outcome of the hearing.

Dated OCTOBER 2, 2006 at Sacramento County, California.

*Patty L. Duran*

-----  
Patty L. Duran, Transcriber  
NORTHERN CALIFORNIA COURT RPTRS

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: In re Hernandez

No.: B202757

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **December 14, 2007**, I served the attached **INFORMAL RESPONSE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Peter Hernandez  
CDC # C-03015  
Correctional Training Facility  
P.O. Box 689  
Soledad, CA 93960-0686

The Honorable Peter Paul Espinoza  
Los Angeles County Superior Court  
Clara Shortridge Foltz Criminal Justice Center  
210 West Temple Street, Department 123  
Los Angeles, CA 90012-3210

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **December 14, 2007**, at Los Angeles, California.

CL Castillo  
Declarant

  
Signature

**EXHIBIT E**

1 Peter Hernandez  
2 CDC # C-03015  
3 P.O. Box 689/F-237-L  
4 Soledad, CA 93960

Date Filed:  
SAN DIEGO DOCKETING

JAN 25 2008

No. *SD 2007 160238*  
BY MARIE RAYOS

5 In pro per

6  
7  
8 SECOND DISTRICT COURT OF APPEALS

9 DIVISION ONE

10  
11  
12 In re:

Case no. B202757

13 PETER HERNANDEZ

PETITIONER'S TRAVERSE TO  
RESPONDENT'S INFORMAL RETURN  
TO PETITION FOR WRIT OF HABEAS  
CORPUS; POINTS AND AUTHORITIES

14 on habeas corpus. /

15  
16  
17 Peter Hernandez (Petitioner), hereby submits this Traverse  
18 to Respondent's Informal Return filed on Dec. 14, 2007, as  
19 ordered by the O.S.C. filed in this Court on Nov. 2, 2007.  
20 Petitioner incorporates by reference, as though fully set forth,  
21 each and every point and authority alleged in his Petition.

22 Petitioner generally denies the allegations alleged and  
23 inferred therein by the informal return and specifically denies  
24 and admits those certain allegations and inferences as follows:

25 Petitioner submits at the outset that Respondent(s) have  
26 not addressed a single point raised in his Petition that his  
27 continued confinement violates his FEDERAL Constitutional rights  
28

1 and reasserts that he is in fact unlawfully incarcerated by  
2 Respondents in violation of the U.S. Constitution;

3 Respondent's allegations that, "[Petitioner asserted]  
4 the decision is not supported by any evidence.", is incorrect  
5 in that the actual allegation is that no SUBSTANTIAL evidence  
6 having indicia of reliability was proffered to deny parole  
7 where an illegal "no parole" policy and/or practice exists  
8 that is therefore unconstitutional by both state and federal  
9 laws and has been found to be so in several recent decisions;

10 Further, "[he] does not dispute the factual basis upon  
11 which the Board denied parole.", is in error because the denial  
12 of suitability was makeweight boilerplate found in 99.99 %  
13 of all Decisions without an individual consideration as required  
14 by statute and numerous courts have held this to be unreasonable  
15 in light of current case law (see Exhibit A, attached);

16 Petitioner denies that the allegations and assertions  
17 by the Board to deny suitability have any basis in fact to  
18 sustain "an unreasonable risk" finding (Respondent's Return  
19 Exhibit 1 at p. 70, (hereafter: [Ex.1]) and is not supported  
20 by ANY reliable evidence and that in point of fact Respondent's  
21 own expert testified there was NO significant risk factors  
22 associated with Petitioner's release to parole [Ex.1], p. 45;

23 Petitioner denies that the proffered Rosenkrantz decision  
24 supports Respondent's position when not only have there been  
25 several intervening Rosenkrantz decisions but that those  
26 superseding decisions fully supported his release and that,  
27 in point of fact, Mr. Rosenkrantz was released some time ago

1 and has continued to be an asset to his community;

2       Petitioner denies Respondent's allegations that past  
3 events, the majority having transpired over THIRTY YEARS ago  
4 are germane to his CURRENT DANGEROUSNESS and Honorable Judge  
5 Hall-Patel noted this paradox in that,

6       "Because Petitioner cannot change the past, denying [him] parole based  
7 only on the facts surrounding the crime itself effectively changes  
8 his sentence from 20-years-to-Life into life imprisonment without  
9 possibility of parole." Id. p. 1046.

10 and, as Respondents concede, "The last such violation occurred  
11 in December 1998 for mutual combat.", hardly "criminal  
12 behavior.", as Respondent would have this Court believe;

13       Petitioner is similarly caught in this spinning web and  
14 Honorable Judge Karlton stated as much in Irons v. Carey (E.D.  
15 Cal. 2005) 358 F.Supp.2d 936, 947, when he observed that this  
16 vicious circle should be stopped when he remonstrated that,

17       "[C]ontinuous reliance on unchanging circumstances transforms an offense  
18 for which California law provides eligibility for parole into a de  
19 facto life imprisonment without the possibility of parole.... Given  
20 that no one seriously contends lack of seriousness or lack of triviality  
21 at the present time, the potential for parole in this case is remote  
22 to the point of non-existence. Petitioner's liberty interest should  
23 not be determined by such an arbitrary, remote possibility."

24       Petitioner is unable to fully translate what is meant  
25 by, "The some evidentiary support for the Board's findings",  
26 as stated on Page 2 at paragraph two, but presumes that whatever  
27 is alleged will make sense to someone however, Petitioner denies  
28 whatever allegations are attempted and submits that this, too,  
could be a further example of makeweight obfuscation;

      Petitioner denies that "The Board [properly] considered  
the positive elements of [his] record ....", and that Division

1 Six of this Appellate District cuts to the nexus:

2 "Because the overarching consideration is public safety, the test in  
3 reviewing the Board's decision denying parole "is not whether some  
4 evidence supports the reasons [the Board] cites for denying parole,  
5 but whether some evidence indicates a parolee's release unreasonably  
6 endangers public safety.'" In re Montgomery (2nd Civ. 2007), DJDAR 16717,  
7 citing In re Barker (1st Civ. 2007) 151 C.A.4th 346, 366.

8 Petitioner denies that the Board relied on any evidence  
9 having indicia of reliability to reach the "overarching  
10 consideration" and that all of the reasons stated by the panel  
11 and alleged by respondents have been found to be part and parcel  
12 of a "no parole" policy and/or practice as evidenced by  
13 Petitioner's attached Exhibit A and that while it is true that  
14 appeal has been taken, it is by the same grasping, nefarious  
15 means cited by Honorable Judge Condlon, herself once a member  
16 in good standing of the prosecutor's views, and duplicitousness  
17 on the part of Respondents is visible and contemptible in the  
18 extreme where, as here, Petitioner has previously TWICE been  
19 found suitable and has achieved an exemplary record in the  
20 vicious confines of an unconstitutional system.

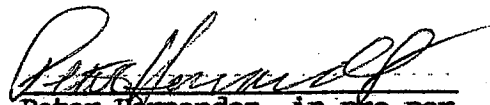
21 Unless specifically admitted Petitioner denies each and  
22 every one of the allegations as set down in the Informal Return  
23 and submits that where, as here, long after the mandatory  
24 minimum has been served (see Irons v. Carey (9th Cir. 2007)  
25 479 F.3d 658, 665), there is ample cause and prejudice arising  
26 from a denial will be unjust.

27 Petitioner respectfully submits that Respondent's Informal  
28 Return is unavailing and the writ should be granted in full.

///

1 WHEREFORE, Petitioner respectfully prays that this Honorable  
2 Court will grant the writ, Order his immediate release from  
3 custody and any and further relief as the Court may deem just  
4 and proper in furtherance of that end.

5  
6 Submitted this 28th day of December 2007.

7  
8   
9 Peter Hernandez, in pro per

**EXHIBIT "A"**

A 1911X-1

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

(ENDORSED)  
**FILED**  
AUG 30 2007  
KIRI TORRE  
Chief Executive Officer/Clerk  
Superior Court of CA County of Santa Clara  
BY **BRET MORROW** DEPUTY

In re

DONNELL JAMEISON,

No.: 71194

On Habeas Corpus

ORDER

INTRODUCTION

Petitioner alleges that he has been denied due process of law because the Board has used standards and criteria which are unconstitutionally vague in order to find him unsuitable for parole. Alternatively, he argues that those standards, even if constitutionally sound, are nonetheless being applied in an arbitrary and meaningless fashion by the Board. He relies upon evidence that in one hundred percent of 2690 randomly chosen cases, the Board found the commitment offense to be "especially heinous, atrocious or cruel", a factor tending to show unsuitability under Title 15 §2402(c)(1).

Are the Board Criteria Unconstitutionally Vague?

Our courts have long recognized that both state and federal due process requirements dictate that the Board must apply detailed standards when evaluating whether an individual inmate is unsuitable for parole on public safety grounds. (See *In re Dannenberg* (2005) 34

Cal.4th 1061 at p. 1096, footnote 16.) Those standards are found in 15 CCR §2402(c) (*Dannenberg, supra*, 34 Cal.4th at p. 1080,) and do include detailed criteria to be applied by the Board when considering the commitment offense:

(c) Circumstances Tending to Show Unsuitability. The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate unsuitability include:

(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:

(A) Multiple victims were attacked, injured or killed in the same or separate incidents.

(B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.

(C) The victim was abused, defiled or mutilated during or after the offense.

(D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.

(E) The motive for the crime is inexplicable or very trivial in relation to the offense.

In response to Petitioners' claim that the regulations are impermissibly vague, Respondent argues that while "especially heinous, atrocious or cruel" might be vague in the abstract it is limited by factors (A)-(E) of §2402(c)(1), and thus provides a 'principled basis' for distinguishing between those cases which are contemplated in that section and those which are not. An examination of cases involving vagueness challenges to death penalty statutes is instructive here and shows that Respondent's position has merit:

"Our precedents make clear that a State's capital sentencing

1 scheme also must genuinely narrow the class of persons eligible  
2 for the death penalty. When the purpose of a statutory  
3 aggravating circumstance is to enable the sentencer to  
4 distinguish those who deserve capital punishment from those who  
5 do not, the circumstance must provide a principled basis for  
6 doing so. If the sentencer fairly could conclude that an  
7 aggravating circumstance applies to every defendant eligible for  
8 the death penalty, the circumstance is constitutionally infirm."  
9 (*Arave v. Creech* (1993) 507 U.S. 463, 474, citing *Maynard v.*  
10 *Cartwright* (1988) 486 U.S. 356, 364: "invalidating aggravating  
11 circumstance that 'an ordinary person could honestly believe'  
12 described every murder," and, *Godfrey v. Georgia* (1980) 446 U.S.  
13 420, 428-429: "A person of ordinary sensibility could fairly  
14 characterize almost every murder as 'outrageously or wantonly  
15 vile, horrible and inhuman.'")

16 It cannot fairly be said that 'every murder' could be  
17 categorized as "especially heinous, atrocious or cruel" under the  
18 Board regulations, since the defining factors contained in  
19 subdivisions (A)-(E) clearly narrow the group of cases to which it  
20 applies. Although Petitioner also argues that the "vague statutory  
21 language is not rendered more precise by defining it in terms or  
22 synonyms of equal or greater uncertainty" (*People v. Superior Court*  
23 (*Engert*) (1982) 31 Cal.3d 797, 803, *Pryor v. Municipal Court* (1979)  
24 25 Cal.3d 238, 249. See also *Walton v. Arizona* (1990) 497 U.S. 639,  
25 654), the factors in those subdivisions are not themselves vague or  
26 uncertain. The mere fact that there may be some subjective component  
27 (such as "exceptionally callous" disregard for human suffering) does  
28 not render that factor unconstitutionally vague. The proper degree  
of definition of such factors is not susceptible of mathematical  
precision, but will be constitutionally sufficient if it gives  
meaningful guidance to the Board.

A law is void for vagueness if it "fails to provide adequate  
notice to those who must observe its strictures and  
impermissibly delegates basic policy matters to policemen,  
judges, and juries for resolution on an ad hoc and subjective  
basis, with the attendant dangers of arbitrary and

discriminatory application." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332, quoting *People ex rel. Gallo v. Acuna* (1997) 14 Cal. 4th 1090, 1116, quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109.)

A review of cases expressing approval of definitions to limit the application of otherwise vague terms in death penalty statutes leads inextricably to the conclusion that the limiting factors in §2402(c) easily pass constitutional muster. An Arizona statute was upheld that provided a crime is committed in an 'especially cruel manner' when the perpetrator inflicts mental anguish or physical abuse before the victim's death," and that "mental anguish includes a victim's uncertainty as to his ultimate fate." (*Walton v. Arizona* (1990) 497 U.S. 639, 654.) Similarly, the court in *Maynard v. Cartwright*, 486 U.S. at 364-365, approved a definition that would limit Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance to murders involving "some kind of torture or physical abuse. In Florida, the statute authorizing the death penalty if the crime is "especially heinous, atrocious, or cruel," satisfied due process concerns where it was further defined as "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon* (1973) 283 So. 2d 1 at p. 9.

Here, the factors in subdivisions (A)-(E) provide equally clear limiting construction to the term "especially heinous, atrocious, or cruel" in §2402(c).

#### Has the Board Engaged in a Pattern of Arbitrary Application of the Criteria?

As previously noted, 15 CCR §2402 provides detailed criteria for determining whether a crime is "exceptionally heinous, atrocious or cruel" such that it tends to indicate unsuitability for parole. Our

1 courts have held that to fit within those criteria and thus serve as  
 2 a basis for a finding of unsuitability, the circumstances of the  
 3 crime must be more aggravated or violent than the minimum necessary  
 4 to sustain a conviction for that offense. (*In re Rosenkrantz* (2002)  
 5 29 Cal.4th 616, 682-683.) Where that is the case, the nature of the  
 6 prisoner's offense, alone, can constitute a sufficient basis for  
 7 denying parole. (*In re Dannenberg, supra*, 34 Cal.4th at p. 1095.)

8 Petitioner claims that those criteria, even if constitutionally  
 9 sound, have been applied by the Board in an arbitrary and capricious  
 10 manner rendering them devoid of any meaning whatever. The role of  
 11 the reviewing court under these circumstances has been addressed  
 12 previously in the specific context of Parole Board actions:

13 "[Courts have] an obligation, however, to look beyond the facial  
 14 validity of a statute that is subject to possible  
 15 unconstitutional administration since a law though fair on its  
 16 face and impartial in appearance may be open to serious abuses  
 17 in administration and courts may be imposed upon if the  
 18 substantial rights of the persons charged are not adequately  
 19 safeguarded at every stage of the proceedings. We have  
 20 recognized that this court's obligation to oversee the execution  
 21 of the penal laws of California extends not only to judicial  
 22 proceedings, but also to the administration of the Indeterminate  
 23 Sentence Law." (*In re Rodriguez* (1975) 14 Cal.3d 639, 648,  
 24 quoting *Minnesota v. Probate Court* (1940) 309 U.S. 270, 277.)

25 Similarly, in *In re Minnis* (1972) 7 Cal.3d 639, 645, the case  
 26 closest on point to the present situation, the California Supreme  
 27 Court stated: "This court has traditionally accepted its  
 28 responsibility to prevent an authority vested with discretion from  
 implementing a policy which would defeat the legislative motive for  
 enacting a system of laws." Where, as here, the question is whether  
 determinations are being made in a manner that is arbitrary and  
 capricious, judicial oversight "must be extensive enough to protect

1 limited right of parole applicants 'to be free from an arbitrary  
 2 parole decision... and to something more than mere pro-forma  
 3 consideration.'" (In re Ramirez (2001) 94 Cal.App.4th 549 at p. 564,  
 4 quoting In re Sturm (1974) 11 Cal.3d 258 at p. 268.)

5 This Court, therefore, now examines Petitioner's "as applied"  
 6 void for vagueness challenge.

#### 7 8 The Evidence Presented

9 A similar claim to those raised here, involving allegations of  
 10 abuse of discretion by the Board in making parole decisions, was  
 11 presented to the Court of Appeal in In re Ramirez, supra. The court  
 12 there observed that such a "serious claim of abuse of discretion"  
 13 must be "adequately supported with evidence" which should be  
 14 "comprehensive." (Ramirez, supra, 94 Cal.App.4th at p. 564, fn. 5.)  
 15 The claim was rejected in that case because there was not "a  
 16 sufficient record to evaluate." (Ibid.) In these cases, however,  
 17 there is comprehensive evidence offered in support of Petitioner's  
 18 claims.

19 Discovery orders were issued in five different cases involving  
 20 life term inmates (Petitioners) who all presented identical claims.<sup>1</sup>  
 21

22 <sup>1</sup> This Court takes judicial notice of the several other cases currently  
 3 pending (Lewis #68038, Criscione #71614, Bragg #108543, Ngo #127611.) which  
 4 raise this same issue and in which proof was presented on this same point.  
 5 (Evidence Code § 452(d)). See specifically, in the habeas corpus context,  
 6 In re Vargus (2000) 83 Cal.App.4th 1125, 1134-1136, 1143, in which judicial  
 7 notice was taken of the evidence in four other cases and in which the court  
 8 noted: "Facts from other cases may assist petitioner in establishing a  
 9 pattern." See generally McKell v. Washington Mutual, Inc. (2006) 142  
 10 Cal.App.4th 1457, 1491: "trial and appellate courts ... may properly take  
 11 judicial notice of ... established facts from both the same case and other  
 12 cases." And see AB Group v. Wertin (1997) 59 Cal.App.4th 1022, 1036:  
 13 "Judicial notice taken of other cases when matters are 'just as relevant to  
 14 the present [case] as they are to the others.'")

1 The purpose of the discovery was to bring before the Court a  
2 comprehensive compilation and examination of Board decisions in a  
3 statistically significant number of cases. The Board decisions under  
4 examination consisted of final decisions of the Board for life-term  
5 inmates convicted of first or second degree murder and presently  
6 eligible for parole. Included were all such decisions issued in  
7 certain months, chosen by virtue of their proximity in time to the  
8 parole denials challenged in the pending petitions. All Board  
9 decisions in the months of August, September and October of 2002,  
10 July, August, September, October, November, and December of 2003,  
11 January and February of 2004, February of 2005, and January of 2006  
12 were compiled. This resulted in a review of 2690 cases decided in a  
13 total of 13 months.

14 The purpose of the review was to determine how many inmates had  
15 actually been denied parole based in whole or in part on the Board's  
16 finding that their commitment offense fits the criteria set forth in  
17 Title 15 §2402(c)(1) as "especially heinous, atrocious or cruel." A  
18 member of the research team conducting the review, Karen Rega,  
19 testified that in its decisions the Board does not actually cite CCR  
20 rule §2402(c), but consistently uses the specific words or phrases  
21 ("verbiage from code") contained therein, so that it could easily be  
22 determined when that criteria was being applied. (For example,  
23 finding "multiple victims" invokes §2402(c)(1)(A); finding the crime  
24 "dispassionate" "calculated" or "execution style" invokes  
25 §2402(c)(1)(B); that a victim was "abused" "mutilated" or "defiled"  
26 invokes §2402(c)(1)(C); a crime that is "exceptionally callous" or  
27 demonstrated a "disregard for human suffering" fits criteria  
28

1 §2402(c)(1)(D); and finding the motive for the crime "inexplicable"  
2 or "trivial" invokes §2402(c)(1)(E).)

3 Petitioners provided charts, summaries, declarations, and the  
4 raw data establishing the above in the cases of Lewis #68038,  
5 Jameison #71194, Bragg #108543, and Ngo #127611. In another case,  
6 (Criscione #71614) the evidence was presented somewhat differently.  
7 Both to spread the burden of the exhaustive examination, and to  
8 provide a check on Petitioners' methods, this Court ordered  
9 Respondent to undertake an examination of two randomly chosen months  
10 in the same manner as Petitioner had been doing. Respondent complied  
11 and provided periodic updates in which they continued to report that  
12 at all "the relevant hearings the Board relied on the commitment  
13 offense as a basis for denying parole." (See "Respondent's Final  
14 Discovery Update" filed April 5, 2007.) At the evidentiary hearing  
15 on this matter counsel for Respondents stipulated that "in all of  
16 those cases examined [by Respondent pursuant to the Criscione  
17 discovery orders] the Board relied on the commitment offense as a  
18 basis for denying parole." (See pages 34-35 of the June 1, 2007,  
19 evidentiary hearing transcript.)

20 The result of the initial examination was that in over 90  
21 percent of cases the Board had found the commitment offense to be  
22 "especially heinous, atrocious or cruel" as set forth in Title 15  
23 §2402(c)(1). In the remaining 10% of cases either parole had been  
24 granted, or it was unclear whether §2402(c)(1) was a reason for the  
25 parole denial. For all such cases, the decisions in the prior  
26 hearing for the inmate were obtained and examined. In every case,  
27 the Board had determined at some point in time that every inmates  
28

1 crime was "especially heinous, atrocious or cruel" under Title 15  
2 §2402(c)(1).

3 Thus, it was shown that 100% of commitment offenses reviewed by  
4 the Board during the 13 months under examination were found to be  
5 "especially heinous, atrocious or cruel" under Title 15 §2402(c)(1).

6 A further statistic of significance in this case is that there  
7 are only 9,750 inmates total who are eligible for, and who are  
8 currently receiving, parole consideration hearings as life term  
9 inmates. (See "Respondent's Evidentiary Hearing Brief," at p. 4,  
10 filed April 16, 2007.)

#### 11 12 USE OF STATISTICS

13 In *International Brotherhood of Teamsters v. United States*  
14 (1977) 431 U.S. 324, 338-340, the United States Supreme Court  
15 reaffirmed that statistical evidence, of sufficient "proportions,"  
16 can be sound and compelling proof. As noted by the court in *Everett*  
17 *v. Superior Court* (2002) 104 Cal.App.4th 388, 393, and the cases cited  
18 therein, "courts regularly have employed statistics to support an  
19 inference of intentional discrimination."

20 More recently, the United States Supreme Court, in *Miller-El v.*  
21 *Cockrell* (2003) 537 U.S. 322, 154 L.Ed.2d 931, when examining a habeas  
22 petitioner's allegations that the prosecutor was illegally using his  
23 peremptory challenges to exclude African-Americans from the  
24 petitioner's jury, noted that "the statistical evidence alone" was  
25 compelling. The high court analyzed the numbers and concluded:  
26 "Happenstance is unlikely to produce this disparity." (See also  
27 *People v. Hofsheier* (2004) 117 Cal.App.4th 438 in which "statistical  
28

1 evidence" was noted as possibly being dispositive. And see *People v.*  
2 *Flores* (2006) 144 Cal.App.4th 625 in which a statistical survey and  
3 analysis, combined into an "actuarial instrument" was substantial  
4 proof.)

5 A statistical compilation and examination such as has been  
6 presented in these cases is entirely appropriate and sufficient  
7 evidence from which to draw sound conclusions about the Board's  
8 overall methods and practices.

9  
10 THE EXPERT'S TESTIMONY

11 Petitioners provided expert testimony from Professor Mohammad  
12 Kafai regarding the statistics and the conclusions that necessarily  
13 follow from them. Professor Kafai is the director of the statistics  
14 program at San Francisco State University, he personally teaches  
15 statistics and probabilities, and it was undisputed that he was  
16 qualified to give the expert testimony that he did. No evidence was  
17 presented that conflicts or contradicts the testimony and conclusions  
18 of Professor Kafai. By stipulation of the parties, Professor Kafai's  
19 testimony was to be admissible and considered in the cases of all  
20 five petitioners. (See page 35 of the June 1, 2007, evidentiary  
21 hearing transcript.)

22 Professor Kafai testified that the samples in each case, which  
23 consisted of two or three months of Board decisions, are  
24 statistically sufficient to draw conclusions about the entire  
25 population of life term inmates currently facing parole eligibility  
26 hearings. Given that every inmate within the statistically  
27 significant samples had his or her crime labeled "particularly  
28

1 egregious' or "especially heinous, atrocious or cruel" under Title  
2 15 §2402(c)(1), it can be mathematically concluded that the same  
3 finding has been made for every inmate in the entire population of  
4 9,750. Although he testified that statisticians never like to state  
5 unequivocally that something is proven to a 100% certainty, (because  
6 unforeseen anomalies are always theoretically possible,) he did  
7 indicate the evidence he had thus far examined came as close to that  
8 conclusion as could be allowed. Not surprisingly, Professor Kafai  
9 also testified that "more than 50% can't by definition constitute an  
10 exception."

11 Having found the data provided to the expert to be sound this  
12 Court also finds the expert's conclusions to be sound. In each of  
13 the five cases before the Court over 400 inmates were randomly chosen  
14 for examination. That number was statistically significant and was  
15 enough for the expert to draw conclusions about the entire population  
16 of 9,750 parole eligible inmates. The fact that the approximately  
17 2000 inmates examined in the other cases also had their parole denied  
18 based entirely or in part on the crime itself (§2402(c)(1)), both  
19 corroborates and validates the expert's conclusion in each individual  
20 case and also provides an overwhelming and irrefutable sample size  
21 from which even a non expert can confidently draw conclusions.

#### 22 DISCUSSION

23  
24 Although the evidence establishes that the Board frequently says  
25 parole is denied "first," "foremost," "primarily," or "mainly,"  
26 because of the commitment offense, this statement of primacy or  
27 weight is not relevant to the question now before the Court.  
28

1 Petitioners acknowledge that the Board generally also cites other  
 2 reasons for its decision. The question before this Court, however,  
 3 is not whether the commitment offense is the primary or sole reason  
 4 why parole is denied -- the question is whether the commitment  
 5 offense is labeled "'particularly egregious'" and thus could be used,  
 6 under *Dannenberg*, primarily or exclusively to deny parole.

7 The evidence proves that in a relevant and statistically  
 8 significant period where the Board has considered life term offenses  
 9 in the context of a parole suitability determination, every such  
 10 offense has been found to be "particularly egregious" or "especially  
 11 heinous, atrocious or cruel."<sup>2</sup> This evidence conclusively  
 12 demonstrates that the Board completely disregards the detailed  
 13 standards and criteria of §2402(c). "Especially" means particularly,  
 14 or "to a distinctly greater extent or degree than is common."<sup>3</sup> (EC §  
 15 451(e).) By simple definition the term "especially" as contained in  
 16 section 2402(C)(1) cannot possibly apply in 100% of cases, yet that  
 17 is precisely how it has been applied by the Board. As pointed out by  
 18 the Second District Court of Appeal, not every murder can be found to  
 19 be "atrocious, heinous, or callous" or the equivalent without "doing

20  
 21 <sup>2</sup> In a single case out of the 2690 that were examined Petitioner has conceded that  
 22 the Board did not invoke §2402(c)(1). This Court finds that concession to be  
 23 improvidently made and the result of over caution. When announcing the decision at  
 24 the initial hearing of S. Fletcher (H-10330) on 4/6/06, the commissioner did begin  
 25 by stating "I don't believe this offense is particularly aggravated..." However  
 26 the commissioner proceeds to describe the crime as a drug deal to which Fletcher  
 27 brought a gun so "we could say there was some measure of calculation in that." The  
 28 commissioner continued by observing that the reason someone would bring a gun to a  
 drug transaction was to make sure things went according to their plan "so I guess  
 we can say that that represents calculation and perhaps it's aggravated to that  
 extent." As is the Board's standard practice, by using the word "calculated" from  
 §2402(c)(1)(b) the Board was invoking that regulation. Certainly if Mr. Fletcher  
 had brought a habeas petition Respondent's position would be that there is "some  
 evidence" supporting this. The ambiguity created by the commissioner's initial  
 statement was cleared up several pages later when he announces that "based upon the  
 crime coupled with..." parole was denied for four years. (See *In re Burns* (2006)  
 136 Cal.App.4th 1318, 1326; holding §2402(c)(1) criteria are necessary for a multi-  
 year denial.)

1 violence" to the requirements of due process. (In re Lawrence (2007)  
 2 150 Cal.App.4th 1511, 1557.) This is precisely what has occurred  
 3 here, where the evidence shows that the determinations of the Board  
 4 in this regard are made not on the basis of detailed guidelines and  
 5 individualized consideration, but rather through the use of all  
 6 encompassing catch phrases gleaned from the regulations.

#### 8 THE BOARD'S METHODS

9 Because it makes no effort to distinguish the applicability of  
 10 the criteria between one case and another, the Board is able to force  
 11 every case of murder into one or more of the categories contained in  
 12 §2402(c).

13 For example, if the inmate's actions result in an instant death  
 14 the Board finds that it was done in a "dispassionate and calculated  
 15 manner, such as an execution-style murder." At the same time the  
 16 Board finds that a murder not resulting in near instant death shows a  
 17 "callous disregard for human suffering" without any further analysis  
 18 or articulation of facts which justify that conclusion. If a knife  
 19 or blunt object was used, the victim was "abused, defiled, or  
 20 mutilated." If a gun was used the murder was performed in a  
 21 "dispassionate and calculated manner, such as an execution-style  
 22 murder." If bare hands were used to extinguish another human life  
 23 then the crime is "particularly heinous and atrocious."

24 Similarly, if several acts, spanning some amount of time, were  
 25 necessary for the murder the Board may deny parole because the inmate  
 26 had "opportunities to stop" but did not. However if the murder was

27 <sup>3</sup> Princeton University World Net Dictionary (2006).  
 28

1 accomplished quickly parole will be denied because it was done in a  
2 dispassionate and calculated manner and the victim never had a chance  
3 to defend themselves or flee. If the crime occurred in public, or  
4 with other people in the vicinity, it has been said that the inmate  
5 "showed a callous disregard" or "lack of respect" for the  
6 "community." However if the crime occurs when the victim is found  
7 alone it could be said that the inmate's actions were aggravated  
8 because the victim was isolated and more vulnerable.

9 In this manner, under the Board's cursory approach, every murder  
10 has been found to fit within the unsuitability criteria. What this  
11 reduces to is nothing less than a denial of parole for the very  
12 reason the inmates are present before the Board - i.e. they committed  
13 murder. It is circular reasoning, or in fact no reasoning at all,  
14 for the Board to begin each hearing by stating the inmate is before  
15 them for parole consideration, having passed the minimum eligible  
16 parole date based on a murder conviction, and for the Board to then  
17 conclude that parole will be denied because the inmate committed acts  
18 that amount to nothing more than the minimum necessary to convict  
19 them of that crime. As stated quite plainly by the Sixth District:  
20 "A conviction for murder does not automatically render one unsuitable  
21 for parole." (*Smith, supra*, 114 Cal.App.4th at p. 366, citing  
22 *Rosenkrantz, supra*, 29 Cal.4th at p. 683.)

23 In summary, when every single inmate is denied parole because  
24 his or her crime qualifies as a §2402(c)(1) exception to the rule  
25 that a parole date shall normally be set, then the exception has  
26 clearly swallowed the rule and the rule is being illegally  
27 interpreted and applied. When every single life crime that the Board  
28

1 examines is "particularly egregious" and "especially heinous,  
2 atrocious or cruel" it is obvious that the Board is operating without  
3 any limits and with unfettered discretion.

4 Other examples of the failure to 'connect up' the facts of the  
5 individual case with the criteria and the ultimate findings abound in  
6 the decisions of the reviewing courts. Some of the state cases to  
7 have reversed Parole Board or Governor abuses of discretion in  
8 denying parole include *In re Roderick*, *In re Cooper*, *In re Lawrence*,  
9 *In re Barker*, *In re Gray*, *In re Lee*, *In re Elkins*, *In re Weider*, *In*  
10 *re Scott*, *In re Deluna*, *In re Ernest Smith*, *In re Mark Smith*, and *In*  
11 *re Capistran*.

12 When "the record provides no reasonable grounds to reject, or  
13 even challenge, the findings and conclusions of the psychologist and  
14 counselor concerning [the inmate's] dangerousness" the Board may not  
15 do so. (*In re Smith* (2003) 114 Cal.App.4th 343, 369.)

16 When an inmate, although only convicted of a second degree  
17 murder, has been incarcerated for such time that, with custody  
18 credits, he would have reached his MEPD if he had been convicted of a  
19 first, the Board must point to evidence that his crime was aggravated  
20 or exceptional even for a first degree murder if they are going to  
21 use the crime as a basis for denying parole. (*In re Weider* (2006)  
22 145 Cal.App.4th 570, 582-583.)<sup>4</sup>

23  
24 <sup>4</sup> This rule, rooted in Justice Moreno's concurrence in *Rosenkrantz*, *supra*, is  
25 particularly applicable in the case of Arthur Criscione. Petitioner was convicted  
26 of second degree, but acquitted of first degree, murder over 25 years ago. (*People*  
27 *v. Criscione* (1981) 125 Cal.App.3d 275.) With his custody credits he is beyond the  
28 petition in which he challenges his 2007 parole denial the first reason the Board  
gave was the crime itself and the presiding commissioner explained: "His actions go  
well beyond the minimum necessary for a conviction of murder in the second degree."  
(Decision page 2 of 4/2/07 transcript.) For the Board to penalize the Petitioner  
for the fact that he was acquitted of first degree is further proof of their

1 A "petitioner's young age at the time of the offense" must be  
 2 considered. (*In re Elkins* (2006) 144 Cal.App.4th 475, 500, quoting  
 3 *Rosenkrantz v. Marshall* (C.D.Cal. 2006) 444 F. Supp. 2d 1063, 1065,  
 4 1085: "The reliability of the facts of the crime as a predictor for  
 5 his dangerousness was diminished further by his young age of 18, just  
 6 barely an adult. 'The susceptibility of juveniles to immature and  
 7 irresponsible behavior means their irresponsible conduct is not as  
 8 morally reprehensible as that of an adult.'")<sup>5</sup>

9 The Board's formulaic practice of stating S2402(c)(1) phrased in  
 10 a conclusory fashion, and then stating "this is derived from the  
 11 facts" without ever linking the two together, is insufficient. (*In*  
 12 *re Roderick*, (2007) \_\_\_\_ Cal.App.4th \_\_\_\_ (A113370): "At minimum, the  
 13 Board is responsible for articulating the grounds for its findings  
 14 and for citing to evidence supporting those grounds." (See also *In*  
 15 *re Barker* (2007) 151 Cal.App.4th 346, 371, disapproving  
 16 "conclusorily" announced findings.)

17 After two decades, mundane "crimes have little, if any,  
 18 predictive value for future criminality. Simply from the passing of  
 19 time, [an inmate's] crimes almost 20 years ago have lost much of  
 20 their usefulness in foreseeing the likelihood of future offenses than  
 21 if he had committed them five or ten years ago." (*In re Lee* (2006)  
 22 143 Cal.App.4th 1400, 1412.) It should be noted that this rule

23 willfulness and bias. The jury had a reasonable doubt that Petitioner committed  
 24 first degree murder but under the Board's 'reasoning' and 'analysis' this puts him  
 25 in a worse position than if they had not. Had the jury convicted him of the  
 26 greater offense Petitioner has served so much time that he would already be having  
 27 subsequent parole hearings on a first and the Board would not have been able to use  
 28 the "some evidence" of first degree behavior against him. As observed previously,  
 the Board's position in this regard is "so ridiculous that simply to state it is to  
 refute it." (*Weider, supra*, 145 Cal.App.4th at p. 583.)  
 This point is particularly significant in the case of Mike Ngo. Mr. Ngo was only  
 18 at the time of his crime. The impetus behind the shooting was youth group or

1 applies with even more force when the Board is relying on any  
2 criminality that occurred before the crime. In that situation, just  
3 as with the crime itself, the Board must explain why such old events  
4 have any relevance and especially when the inmate has spent a decade  
5 as a model prisoner.

6 Murders situationally related to intimate relationships are  
7 unfortunately commonplace because emotions are strongest in such  
8 domestic settings. When a murder occurs because of "stress unlikely  
9 to be reproduced in the future" this is a factor that affirmatively  
10 points towards suitability. (*In re Lawrence* (2007) 150 Cal.App.4th  
11 1511 and cases cited therein.)

12 "The evidence must substantiate the ultimate conclusion that the  
13 prisoner's release currently poses an unreasonable risk of danger to  
14 the public. It violates a prisoner's right to due process when the  
15 Board or Governor attaches significance to evidence that forewarns no  
16 danger to the public." (*In re Tripp* (2007) 150 Cal.App.4th 306,  
17 313.)

18 The Board "cannot rely on the fact that the killing could have  
19 been avoided to show the killing was especially brutal." (*In re*  
20 *Cooper* (2007) 153 Cal.App.4th 1043, 1064.)

21 The Board's focus must be upon how the inmate "actually  
22 committed his crimes" not the "incorporeal realm of legal  
23 constructs." (*Lee, supra*, 143 Cal.App.4th at p. 1413.) This is  
24 especially significant when the murder conviction is based on the  
25 felony murder rule, provocative act doctrine, or accomplice liability  
26 such that the inmate did not intend to kill or may not have even been  
27 gang rivalries, posturing, and threats which mature adults would not have been  
28

1 the actual killer.

2 The Board has ample guidance before it in the decisions of the  
3 various reviewing courts to constrain its abuse, but has failed to  
4 avail itself of the opportunity to do so.

#### 5 6 SEPARATION OF POWERS DOCTRINE

7 The evidence presented, as discussed above, has established a  
8 void for vagueness "as applied" due process violation. That same  
9 evidence also proves a separate but related Constitutional violation  
10 -- an as applied separation of powers violation.

11 The separation of powers doctrine provides "that the legislative  
12 power is the power to enact statutes, the executive power is the  
13 power to execute or enforce statutes, and the judicial power is the  
14 power to interpret statutes and to determine their  
15 constitutionality." (*Lockyer v. City and County of San Francisco*  
16 (2004) 33 Cal.4th 1055, 1068.) Because the evidence has proven the  
17 Board is not executing/enforcing the legislature's statutes as  
18 intended it is this Court's duty to intervene. The question here is  
19 whether the Board is violating the separation of powers doctrine by  
20 appropriating to itself absolute power over parole matters and  
21 disregarding the limits and guidelines placed by the statute.<sup>6</sup>

22 "Government Code section 11342.2 provides: 'Whenever by the  
23

24 caught up in.

25 "It is settled that Administrative regulations that violate acts of the  
26 Legislature are void and no protestations that they are merely an exercise of  
27 administrative discretion can sanctify them. They must conform to the legislative  
28 will if we are to preserve an orderly system of government. Nor is the motivation  
29 of the agency relevant: It is fundamental that an administrative agency may not  
30 usurp the legislative function, no matter how altruistic its motives are."  
31 (*Agricultural Labor Relations Board v. Superior Court of Tulare County* (1976) 16  
32 Cal.3d 392, 419 quoting *Morris v. Williams* (1967) 67 Cal.2d 733, 737, and *City of*  
33 *San Joaquin v. State Bd. of Equalization* (1970) 9 Cal.App.3d 365, 374.)

1 express or implied terms of any statute a state agency has authority  
 2 to adopt regulations to implement, interpret, make specific or  
 3 otherwise carry out the provisions of the statute, no regulation  
 4 adopted is valid or effective unless consistent and not in conflict  
 5 with the statute and reasonably necessary to effectuate the purpose  
 6 of the statute.' Administrative regulations that alter or amend the  
 7 statute or enlarge or impair its scope are void and courts not only  
 8 may, but it is their obligation to strike down such regulations."  
 9 (*Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75  
 10 Cal.App.4th 1315, 1341, citations omitted.)

11 The vice of overbroad and vague regulations such as are at issue  
 12 here is that they can be manipulated, or 'interpreted,' by executive  
 13 agencies as a source of unfettered discretion to apply the law  
 14 without regard to the intent of the people as expressed by the  
 15 legislature's enabling statutes. In short, agencies usurp unlimited  
 16 authority from vague regulations and become super-legislatures that  
 17 are unaccountable to the people. As it has sometimes been framed and  
 18 addressed in the case law, a vague or all encompassing standard runs  
 19 the risk of "violat[ing] the separation of powers doctrine by  
 20 "transforming every [executive decisionmaker] into a "mini-  
 21 legislature" with the power to determine on an ad hoc basis what  
 22 types of behavior [satisfy their jurisdiction]." (*People v. Ellison*  
 23 (1998) 68 Cal.App.4th 203, 211; quoting *People v. Superior Court*  
 24 (*Caswell*) (1988) 46 Cal.3d 381, 402.)

25 "It is concern about 'encroachment and aggrandizement,' the  
 26 [United States Supreme Court] reiterated, that has animated its  
 27 separation of powers jurisprudence. 'Accordingly, we have not  
 28

1 hesitated to strike down provisions of law that either accrete to a  
2 single Branch powers more appropriately diffused among separate  
3 Branches or that undermine the authority and independence of one or  
4 another coordinate Branch.'" (*Kasler v. Lockyer* (2000) 23 Cal.4th  
5 472, 493, quoting *Mistretta v. United States* (1989) 488 U.S. 361,  
6 382.) This articulation of the principle speaks directly to the  
7 situation at hand. The Board, by its enactment and interpretation of  
8 Title 15, §2402, has appropriated to itself absolute power over  
9 'lifer' matters. Overreaching beyond the letter and spirit of the  
10 Penal Code provisions, Title 15, §2402(c)(1) has been interpreted by  
11 the Board to supply the power to declare every crime enough to deny  
12 parole forever. The fact that Title 15, §2402, has been invoked in  
13 every case, but then sometime later not invoked, tends to show either  
14 completely arbitrary and capricious behavior or that unwritten  
15 standards are what really determine outcomes. In either event, all  
16 pretenses of taking guidance from, or being limited by, the  
17 legislature's statutes have been abandoned. "[I]t is an elementary  
18 proposition that statutes control administrative interpretations."  
19 (*Ohio Casualty Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64, 78.)  
20 Title 15 §2402 as applied, however, has no controls or limitations.

21 The PC § 3041(b) exception to the rule can only be invoked when  
22 the "gravity of the current convicted offense or offenses, or the  
23 timing and gravity of current or past convicted offense or offenses,  
24 is such that consideration of the public safety requires a more  
5 lengthy period of incarceration for this individual." The word  
6 "gravity" is a directive for comparison just as "more lengthy"  
7 indicates a deviation from the norm. While *Dannenberg* held there  
8

1 does not need to be intra case comparison for the purposes of term  
2 uniformity or proportionality, there necessarily has to be some sort  
3 of comparison for the purposes of adhering to the legislative mandate  
4 that parole is available. The Board employs no meaningful yardstick  
5 in measuring parole suitability. This is a violation of the  
6 separation of powers doctrine. (*People v. Wright* (1982) 30 Cal.3d  
7 705, 712-713. And see *Terhune v. Superior Court* (1998) 65  
8 Cal.App.4th 864, 872-873. Compare *Whitman v. Am. Trucking Ass'n*  
9 (2001) 531 U.S. 457, 472, describing a delegation challenge as  
10 existing when the legislature fails to lay down "an intelligible  
11 principle to which the person or body authorized to act is directed  
12 to conform.")

#### 13 14 RESPONDENT'S POSITION

15 The Attorney General has suggested, without pointing to any  
16 concrete examples, that it is possible that the Board, when invoking  
17 the crime as a reason to deny parole, is not placing it within  
18 S2402(c)(1) but instead using it as some sort of 'lesser factor'  
19 which, only when combined with other unsuitability criteria, can  
20 contribute to a valid parole denial. The two problems with this  
21 position are, first, there is no evidentiary support for this  
22 assertion, and second, it would have no impact on the constitutional  
23 infirmities outlined and proven above.

24 Even if Respondent had produced evidence that the Board was  
25 utilizing the crime as a 'lesser factor' which needs others to fully  
26 support a parole denial, the Board would then be admitting it was  
27 denying parole, in part, for the very reason that the person is  
28

1 before the panel and eligible for parole in the first place - the  
2 commitment offense. Respondent's argument suggests that a crime that  
3 only qualified as the *Dannenberg* "minimum necessary" could still be  
4 invoked as a reason for denying parole. Respondent argues that when  
5 the crime is invoked 'not in the *Dannenberg* sense,' there must be  
6 other reasons for the parole denial and the crime alone would not be  
7 enough in this context. This position is inconsistent with the law  
8 and fundamental logic.

9 A crime qualifies under *Dannenberg* when it is "particularly  
10 egregious," or one where "no circumstances of the offense reasonably  
11 could be considered more aggravated or violent than the minimum  
12 necessary to sustain a conviction for that offense." (*Dannenberg*,  
13 *supra*, 34 Cal.4th at pp. 1094-1095.) These are the only two choices.  
14 If a crime consists of only the bare elements then it is not  
15 aggravated and it cannot, in and of itself, serve as a basis for  
16 parole denials once the inmate becomes eligible for parole. It is  
17 the reason an inmate may be incarcerated initially for the equivalent  
18 of 15 or 25 years, and then examined to determine rehabilitation  
19 efforts when they come before the Board, but a crime that is no more  
20 than the bare minimum cannot be factored into the equation pursuant  
21 to PC § 3041(b) or any of the case law interpreting it.

22 In oral argument Respondent suggested a second way the  
23 commitment offense can be used outside of §2402(c)(1). If for  
24 example a crime had its roots in gang allegiances or rivalries and  
25 the inmate continued to associate with gangs while incarcerated, then  
26 an aspect of the crime, even if the crime otherwise consisted of no  
27 more than the minimum elements, could be combined with other behavior  
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1 to support a parole denial. Similarly, if a crime was rooted in an  
2 inmate's then existing drug addiction, and the Board was to point to  
3 a recent 115 involving drugs, the evidence that the inmate's drug  
4 issues had not been resolved would justify a parole denial even if  
5 the crime itself was not aggravated. A finding that the inmate is  
6 not suitable for release under these circumstances, however, is not  
7 based on the facts of the commitment offense as tending to show  
8 unsuitability. It is based on the conclusion that can be drawn about  
9 Petitioner's lack of rehabilitation or change since the offense, and  
10 thus, his present dangerousness.

11 Respondent has not demonstrated any flaws in Petitioner's  
12 methodology or analysis, nor provided any actual evidence of the  
13 crime being invoked other than pursuant to §2402(c)(1). Drawing  
14 conclusions from the Board's direct statements, or its precise  
15 recitations of the §2402(c)(1) language, logically indicates an  
16 invocation of §2402(c)(1), and Respondent's suggestion otherwise is  
17 insupportable.

#### 18 THE QUESTION OF BIAS

19 Because the issue has been squarely presented, and strenuously  
20 argued by Petitioners, this Court is obligated to rule on the charge  
21 that the Board's actions prove an overriding bias and deliberate  
22 corruption of their lawful duties.

23 In the discrimination and bias case of *USPS Bd. of Governors v.*  
24 *Aikens* (1983) 460 U.S. 711, the United States Supreme Court  
25 acknowledged "there will seldom be 'eyewitness' testimony as to the  
26 [.] mental processes" of the allegedly biased decisionmaker. Instead,  
27  
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1 an examination of other cases for trends or patterns can provide the  
 2 necessary circumstantial evidence. (See *Aikens, supra*, at footnote  
 3 2.) Reaffirming that such circumstantial evidence will be sufficient  
 4 the Court stated: "The law often obliges finders of fact to inquire  
 5 into a person's state of mind. As Lord Justice Bowen said in  
 6 treating this problem in an action for misrepresentation nearly a  
 7 century ago, 'The state of a man's mind is as much a fact as the  
 8 state of his digestion. It is true that it is very difficult to  
 9 prove what the state of a man's mind at a particular time is, but if  
 10 it can be ascertained it is as much a fact as anything else.'"   
 11 (*Aikens*, at pp. 716-717, quoting *Edgington v. Fitzmaurice* (1885) 29  
 12 Ch. Div. 459, 483.)<sup>7</sup>

13 The discovery in these cases was granted in part due to the  
 14 Petitioners' prima facie showing of bias and the necessity that it be  
 15 "adequately supported with evidence" if such evidence is available.  
 16 (*Ramirez, supra*, 94 Cal.App.4th at p. 564, fn. 5. See also *Nasha v.*  
 17 *City of Los Angeles* (2004) 125 Cal.App.4th 470, 483: "A party seeking  
 18 to show bias or prejudice on the part of an administrative decision  
 19 maker is required to prove the same 'with concrete facts.'" And see  
 20 *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674,  
 21 841: "The challenge to the fairness of the adjudicator must set forth  
 22 concrete facts demonstrating bias or prejudice." See also *Hobson v.*

3  
 4 <sup>7</sup> As occurred in *Aikens, supra*, and as suggested in prior orders of this Court,  
 5 Respondent should have provided direct evidence from the decisionmakers. While the  
 6 fact that a Defendant does not explain his or her actions cannot be held against  
 7 him, (*Griffin v. California* (1965) 380 U.S. 609; *Doyle v. Ohio* (1976) 426 U.S.  
 8 610,) it is appropriate to give some weight to the consideration that the Board has  
 9 failed to offer any direct evidence or explanation on its own behalf. While the  
 10 case of *Hornung v. Superior Court* (2000) 81 Cal.App.4th 1095 stands for the  
 11 proposition that Petitioner may not inquire into the Board members' mental  
 12 processes, Respondent is not precluded from offering such direct evidence if they  
 13 were able to testify as to their good faith and conscientious efforts.

1 Hansen (1967) 269 F.Supp. 401, 502, the watershed Washington D.C.  
 2 school desegregation case in which the court determined from a  
 3 statistical and factual analysis that racial bias was influencing  
 4 policy.)

5 In the case of *People v. Adams* (2004) 115 Cal.App.4th 243, 255,  
 6 a similar claim of biased decision making was asserted and it was  
 7 rejected because, although the defendant clearly articulated it, "he  
 8 has not demonstrated it. Therefore, he has failed to bear his burden  
 9 of showing a constitutional violation as a demonstrable reality, not  
 10 mere speculation." In the present cases Petitioners have provided  
 11 overwhelming concrete evidence. It is difficult to believe that the  
 12 Board's universal application of S2402(c)(1) has been an inadvertent  
 13 mistake or oversight on their part. It is hard to credit the Board's  
 14 position that it does not know its own patterns and practices reveal  
 15 a complete lack of standards or constraints on their power.  
 16 Respondent's protestations ring hollow, and it seems a statistical  
 17 impossibility, that the Board's use of "detailed" criteria in such a  
 18 fashion that they are rendered meaningless is a result of good faith  
 19 efforts on their part. That every murder is "especially heinous,  
 20 atrocious or cruel," and can therefore be an exception to the rule  
 21 that a parole date should be set, does not seem to be an accident on  
 22 their part.

23 Although no court has thus far agreed with the accusation that  
 24 the Board approaches its duties with a predetermination and a bias,  
 25 no court has previously been presented the comprehensive evidence  
 26 outlined herein. While this Court does not turn a blind eye to the  
 27 reasonable conclusion that the Board's unconstitutional practices are  
 28

1 willful, there is another possibility. The pattern of errors  
2 demonstrated by the discovery in this case, and the continuously  
3 growing body of Court of Appeal opinions finding consistent and  
4 persistent abuse of discretion, may instead be caused by the fact  
5 that the Board is simply overworked and substantively untrained. The  
6 impossibility of the blanket applicability of §2402(c)(1) may be only  
7 the result of sloppy preparation and inadvertent carelessness.

8 The Board must first be given an opportunity to comply with the  
9 necessary remedy provided by this court before it is possible to  
10 enter a finding of conscious bias and illegal sub rosa policy. To do  
11 otherwise would ignore the complexities and magnitude of the largely  
12 discretionary duties with which that Board is vested.

#### 13 14 CONCLUSION

15 The conclusive nature of the proof in this case, and the  
16 suggestion of institutional bias do not preclude formulation of an  
17 remedy which will guarantee adequate restrictions on, and guidance  
18 for, the Board's exercise of discretion in making parole suitability  
19 determinations. The Board can be made to lawfully perform its duties  
20 if given explicit instructions.

21 As noted supra, a reason the proof in this case irrefutably  
22 establishes constitutional violations is because the Board does not,  
23 in actual fact, operate within the limiting construction of the  
24 regulations. The Board's expansive interpretation allows it to  
25 operate without any true standards. Although numerous rulings of  
26 both state and federal courts of appeal have invalidated the Board's  
27 application of the §2402(c) criteria to particular facts, the Board  
28

1 does not take guidance from these binding precedents and ignores them  
2 for all other purposes. In the most recent of these cases, *In re*  
3 *Roderick*, (2007) \_\_\_ Cal.App.4th \_\_\_ (A113370) the First District  
4 held four of five §2402 factors "found" by the Board to be  
5 unsupported by any evidence. At footnote 14 the court took the time  
6 to criticize the Board for its repeated use of a "stock phrase"  
7 "generically across the state." The court also clarified that "at  
8 minimum, the Board is responsible for articulating the grounds for  
9 its findings and for citing to evidence supporting those grounds."

10 There is nothing in the evidence presented that would allow any  
11 conclusion but that, without intervention of the Courts, the Board  
12 will ignore the lessons of these rulings in the future and continue  
13 to employ its formulaic approach of citing a criteria from  
14 §2402(c)(1), repeating the facts of the crime, but never  
15 demonstrating a logical connection between the two. This is the  
16 core problem with the Board's methodology -- they provide no  
17 explanation or rationale for the findings regarding the crime itself.

18 This practice results in violence to the requirements of due  
19 process and individualized consideration which are paramount to the  
20 appropriate exercise of its broad discretion.

21 The only solution is one that compels the Board to identify the  
22 logical connection between the facts upon which it relies and the  
23 specific criteria found to apply in the individual case. For  
24 example, the Board often finds that an inmate's motive is "trivial"  
25 without ever suggesting why, on these facts, that motive is not just  
26 as trivial as the motive behind any other murder. What motive is not  
27 trivial? By any definition "trivial" is a word of comparison and  
28

1 only has meaning when there can be examples that are not "trivial."

2 Similarly, although the Sixth District made it plain four years  
3 ago that "all [] murders by definition involve some callousness," (In  
4 re *Smith* (2003) 114 Cal.App.4th 343, 345,) the Board has continued to  
5 deny countless paroles labeling the crime "callous" without ever  
6 suggesting what crime would not qualify as "callous" and without  
7 consistently explaining why the individual case before it  
8 demonstrates "exceptional" callousness.

9 Respondent has consistently refused to suggest what possible  
10 instances of murder would not fit the Board's amorphous application  
11 of the §2402 criteria. Citing *Dannenberg*, Respondent insists such  
12 comparative analysis is unnecessary. Respondent fundamentally  
13 misunderstands the *Dannenberg* holding.

14 The PC § 3041(b) exception to the rule can only be invoked when  
15 the "gravity of the current convicted offense or offenses, or the  
16 timing and gravity of current or past convicted offense or offenses,  
17 is such that consideration of the public safety requires a more  
18 lengthy period of incarceration for this individual." The word  
19 "gravity" is a directive for comparison just as "more lengthy"  
20 indicates a deviation from the norm. While *Dannenberg* held there  
21 does not need to be intra case comparison for the purposes of term  
22 uniformity or proportionality, there necessarily has to be some sort  
23 of comparison for the purposes of adhering to the legislative mandate  
24 that parole is available. This is implicit in §2402 because the  
25 qualifier "especially," in "especially heinous atrocious or cruel,"  
26 requires that some form of comparison be made. While the original  
27 drafters of §2402 seemed to have recognized this fact, the ongoing  
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1 conduct of the Board has completely ignored it, and this is the  
 2 essence of the due process violation Petitioners have asserted.

3 As noted in his dissent in the recent case of *In re Roderick*,  
 4 *supra*, Justice Sepulveda would have deferred to the Board's  
 5 'exercise' of discretion because "Board members have both training  
 6 and vast experience in this field. They conduct literally thousands  
 7 of parole suitability hearings each year. The Board therefore has  
 8 the opportunity to evaluate the egregiousness of the facts of a great  
 9 number of commitment offenses. ... The Board's training and  
 10 experience in evaluating these circumstances far exceeds that of  
 11 most, if not all, judges." The evidence in this case, however,  
 12 suggests a flaw in granting such deference. Since the Board  
 13 continues to place every murder in the category of offenses "tending  
 14 to show unsuitability," something is certainly wrong. Since the  
 15 Board's vast experience is undeniable, the problem must be in the  
 16 Board's training and understanding of the distinguishing features of  
 17 the guidelines and criteria. Although Justice Sepulveda presumes  
 18 that Board members receive substantive training, there is no evidence  
 19 before this court to suggest that it does, and substantial  
 20 circumstantial evidence to suggest that it does not.

21 In the vast numbers of Santa Clara County cases reviewed by this  
 22 Court, the Board's formulaic decisions regarding the commitment  
 23 offense do not contain any explanation or thoughtful reasoning.  
 24 Instead, the Board's conclusionary invocation of words from  
 25 §2402(c)(1) is linked to a repetition of the facts from the Board  
 26 report by the stock phrase: "These conclusions are drawn from the  
 27 statement of facts wherein ..." Thereafter the inmate files a habeas  
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1 corpus petition and Respondent, after requesting an extension of  
2 time, files a boilerplate reply asserting the Board's power is  
3 "great" and "almost unlimited" and thus any "modicum" of evidence  
4 suffices. Respondent does not cite or distinguish the expanding body  
5 of case law that is often directly on point as to specific findings  
6 made. Thereafter, if the writ is granted, the Board is directed to  
7 conduct a new hearing "in compliance with due process" and that order  
8 is appealed by Respondent. On appeal the order is usually upheld  
9 with modifications and in the end, after countless hours of attorney  
10 and judicial time, the Board conducts a new two hour hearing at which  
11 they abuse their discretion and violate due process in some different  
12 way.

13 This system is malfunctioning and must be repaired. The  
14 solution must begin with the source of the problem. The Board must  
15 make efforts to comply with due process in the first instance. The  
16 case law published over the last five years provides ample and  
17 sufficient guidelines and must be followed. Although the Board  
18 methods suggest it believes this to be optional, it is not.

#### 20 THE REMEDY

21 Thus, it is the order of this Court that the Board develop,  
22 submit for approval, and then institute a training policy for its  
23 members based on the current and expanding body of published state,  
24 and federal, case law reviewing parole suitability decisions, and  
25 specifically the application of §2402 criteria. In addition to  
26 developing guidelines and further criteria for the substantive  
27 application of §2402 the Board must develop rules, policies and  
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1 procedures to ensure that the substantive guidelines are followed.

2 This Court finds its authority to impose this remedy to flow  
3 from the fundamental principles of judicial review announced over two  
4 centuries ago in *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137.

5 Citing that landmark case, the California Supreme Court has  
6 recognized "Under time-honored principles of the common law, these  
7 incidents of the parole applicant's right to 'due consideration'  
8 cannot exist in any practical sense unless there also exists a remedy  
9 against their abrogation." (*In re Sturm* (1974) 11 Cal.3d 258, 268.)

10 In *Sturm* the court directed that the Board modify its rules and  
11 procedures so that thereafter "The Authority will be required, per  
12 commencing with the finality of this opinion, to support all its  
13 denials of parole with a written, definitive statement of its reasons  
14 therefor and to communicate such statement to the inmate concerned."  
15 (*Sturm* at p. 273.)

16 Similarly, in the case of *Minnis, supra*, the California Supreme  
17 Court held the Board's policy of categorically denying parole to drug  
18 dealers was illegal. Based on its analysis the court there was  
19 clearly prepared to order that Board to modify its rules and  
20 procedures however such was unnecessary because the Board  
21 "voluntarily rescinded" the illegal policy. While the remedy in this  
22 case is of greater scope than that necessary in either *Sturm* or  
23 *Minnis, supra*, so too has been the showing of a systematic abuse of  
24 discretion and distortion of process.

25 The most recent case to address the court's roles and duties in  
26 overseeing the parole suitability process has been *In re Rosenkrantz*,  
27 *supra*, 29 Cal.4th 616. In that case the court explained that  
28

1 judicial review of a Governor's parole determination comports with,  
2 and indeed furthers, separation of powers principles because the  
3 courts are not exercising "complete power" over the executive branch  
4 and do not "defeat or materially impair" the appropriate exercise or  
5 scope of executive duties. (Rosenkrantz at p. 662.) Citing *Strum*,  
6 *supra*, the court reaffirmed that a life term inmate's "due process"  
7 rights cannot exist in any practical sense without a remedy against  
8 its abrogation." (Rosenkrantz at p. 664.)

9 The *Rosenkrantz* court also put forth what it believed was an  
10 extreme example but which, unfortunately, has been shown to exist in  
11 this case. The court stated: "In the present context, for example,  
12 judicial review could prevent a Governor from usurping the  
13 legislative power, in the event a Governor failed to observe the  
14 constitutionally specified limitations upon the parole review  
15 authority imposed by the voters and the Legislature." This is  
16 exactly what the evidence in this case has proven. As noted above  
17 the Board has arrogated to itself absolute authority, despite  
18 legislative limitations and presumptions, through the mechanism of a  
19 vague and all inclusive, and thus truly meaningless, application of  
20 standards. The remedy this Court is imposing is narrowly tailored to  
21 redress this constitutional violation.

22 The consequence of the Board's actions (of giving § 2402(c)(1)  
23 such a broadly all encompassing and universal application) is that  
24 they have unwittingly invalidated the basis of the California Supreme  
25 Court's holding in *Dannenberg*. The reason the four justice majority  
26 in *Dannenberg* upheld the Board's standard operating procedures in the  
27 face of the Court of Appeal and dissent position is because "the  
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1 Board must apply detailed standards when evaluating whether an  
 2 individual inmate is unsuitable for parole on public safety grounds."  
 3 (Dannenberg at p. 1096, footnote 16. See also page 1080: "the  
 4 regulations do set detailed standards and criteria for determining  
 5 whether a murderer with an indeterminate life sentence is suitable  
 6 for parole.") However, Petitioners in these cases have proven that  
 7 there are no "detailed standards" at all. Instead the Board has  
 8 systematically reduced the "detailed standards" to empty words. The  
 9 remedy this Court orders, that there truly be "detailed standards,"  
 10 requires the promulgation of further rules and procedures to  
 11 constrain and guide the Board's powers. This remedy differs in  
 12 specifics, but not in kind, from what courts have previously imposed  
 13 and have always had the power to impose.

14 The Board must fashion a training program and further rules,  
 15 standards and regulations based on the opinions and decisions of the  
 16 state and federal court cases which provide a limiting construction  
 17 to the criteria which are applied.<sup>8</sup> The Board must also make  
 18 provisions for the continuing education of its commissioners as new  
 19 case law is published and becomes binding authority. This Court will  
 20 not, at this point, outline the requirements and lessons to be taken  
 21 from the above cases. It is the Board's duty, in the first instance  
 22 to undertake this task. The training program, and associated rules  
 23 and regulations, shall be served and submitted to this Court, in

24  
 25 <sup>8</sup> While the showing and analysis in this case was limited to § 2402(c)(1), the  
 26 conclusions that the evidence compelled, that the Board has been carelessly  
 27 distorting and misapplying the regulations, is not so limited. Accordingly, the  
 28 training program that is necessary for the Board can not reasonably be limited to  
 just § 2402(c)(1). Thus, to the extent case law recognizes, clarifies and  
 establishes remedies for other due process violations they must also be  
 incorporated into the necessary rules and training the Board is required to abide  
 by.

1 writing, within 90 days. Counsel for Petitioners, and any other  
 2 interested parties, may submit briefs or comments within 30 days  
 3 thereafter. After receipt and review of the materials this Court  
 4 will finalize the training program, and associated rules, and the  
 5 Petitioners in these cases shall receive a new hearing before a Board  
 6 that does not operate with the unfettered discretion and caprice  
 7 demonstrated by the evidence here presented.

# ORDER

9 For the above reasons the habeas corpus petition is granted and  
 10 it is hereby ordered that Petitioner be provide a new hearing which  
 11 shall comply with due process as outlined above. Respondent shall  
 12 provide weekly updates to this Court on the progress of its  
 13 development of the new rules and regulations outlined above.

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*Aug 30, 2007*

LINDA R. CONDRON  
 JUDGE OF THE SUPERIOR COURT



cc: Petitioner's Attorney (Jacob Burland)  
 Attorney General (Denise Yates, Scott Mather)

2008 JAN 25 AM 8:15  
 ATTORNEY GENERAL  
 SAN DIEGO

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 DEPARTMENT OF JUSTICE  
 SACRAMENTO OFFICE

**EXHIBIT F**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION ONE

In re

PETER HERNANDEZ,

on

Habeas Corpus.

B202757

(L.A.S.C. No s. A334928, BH004508)

ORDER

COURT OF APPEAL - SECOND DIST.

**FILED**

**JAN 11 2008**

JOSEPH A. LANE

Clerk

S. LUI

Deputy Clerk

THE COURT\*:

The petition for writ of habeas corpus, filed October 15, 2007; and the informal opposition thereto, filed December 14, 2007, have been read and considered.

The petition is denied.

\_\_\_\_\_  
\*MALLANO, Acting P. J.

\_\_\_\_\_  
VOGEL, J.

\_\_\_\_\_  
JACKSON, J.\*\*

\_\_\_\_\_  
\*\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

**EXHIBIT G**

**S160160**

**COPY**

SUPREME COURT OF CALIFORNIA

In re:

PETER HERNANDEZ,

On habeas corpus.

Case no. \_\_\_\_\_

Sup. Ct. no. BH004508

App. Ct. no. B-202757

PETITION FOR REVIEW

COVER SHEET

**SUPREME COURT  
FILED**

**JAN 22 2008**

**Frederick K. Ohlrich Clerk**

**Deputy**

**RECEIVED**

**JAN 22 2008**

**CLERK SUPREME COURT**

Submitted by:

Peter Hernandez  
CDC # C-03015  
P.O. Box 689  
Soledad, CA 93960

SUPREME COURT OF CALIFORNIA

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PETITION FOR REVIEW

AFTER DENIAL IN THE CALIFORNIA COURT OF APPEALS,  
SECOND DISTRICT; WHICH DENIAL WAS FILED ON 1/11/08.

TO: HONORABLE CHIEF JUSTICE RONALD GEORGE AND THE ASSOCIATE JUSTICES  
OF THE CALIFORNIA STATE SUPREME COURT IN SACRAMENTO, CALIFORNIA

INTRODUCTION

Peter Hernandez, (petitioner), hereby lodges this Petition For Review with this honorable Court after denial in the Second District Court of Appeals, Division ONE. A copy of that denial is attached hereto as Exhibit "A". Petitioner is seeking to settle important questions of law and secure privileges to which he is entitled under statutory authority and that are fully embodied in both state and federal Constitution's rights pertaining to, but not limited to: Due Process, Equal Protection, and the adequate representation of petitioner's interests during proceedings which respondents have initiated. This is of no small import inasmuch as respondents are the sole provider of the guarantees of which petitioner seeks to avail of in order to attempt to reclaim his liberty interests and release from custody or to have his Hearing reheard with instructions to the panel.

Respondents are not only the sole providers of these guarantees but, by virtue of their position, have sway over the methods and quality of the legal, ethical, and judicious assurance of those rights to comport with federal due process guarantees which have become part and parcel of our legal fabric.

DISCUSSION

Petitioner is an inmate at Correctional Training Facility, Central Facility (CTF-C), in Soledad, California, where he is serving a seven (7) years-to-life term for murder of the first degree, Penal Code (PC) §§ 187, 12022(a), as well as several related crimes when he confronted a suspected robber, after conviction in the Los Angeles County Superior Court. Petitioner is not challenging his conviction in the within action and for the purposes of this matter accepts the decision of the Los Angeles County Superior Court, notwithstanding those viable claims in his direct

appeal which are not being addressed nor argued herein.

#### QUESTIONS PRESENTED

1. Does Petitioner's state and federal constitutional rights to due process and equal protection become violated by respondents when they deny to him the individualized considerations mandated and required by statutory authority and all the clearly established laws?
2. Are Petitioner's federal rights to due process and equal protection violated when respondents utilize a lesser standard of legal proof which requires evidence with some indicia of reliability to find Petitioner unsuitable to parole and therefore an unreasonable risk to the public safety although contrary to the professional testimony?
3. Does petitioner's federally-cognizable liberty interests in release to parole created by respondent's statutory scheme and mandatory language of the enabling statute that requires a suitability finding under statutory criteria prevail when respondents "substantial evidence" burden of proof is not met herein by any standard relying on U.S. SUPREME Court case law?

#### NECESSITY FOR REVIEW

In this case, the Board of Prison Hearings (BPH) refused to set a parole release date, relying on PC §3041(b). This Court's decision in In re Rosenkrantz (2002) 29 Cal.4th 616, and more recently in In re Dannenberg (2005) 34 Cal.4th 1061, do not appear to establish any limits to the BPH and/or governor whatsoever as to the use of the offense to deny parole in almost all meritorious cases that come before it.

Does PC §3041(b) then, allow the BPH or the governor to convert offenses for which the statutes create a presumption of suitability and term setting at the Minimum Eligible Parole Date (MEPD), into express Life-Without-Parole sentences at their discretion? In a similar fashion, can the California Code of Regulations (CCR), title 15, §2402(c), be used in perpetuity to deny parole, based on only those enumerated circumstances and factors specified in the Regulations focused on, despite the overwhelming and incontrovertible evidence of suitability and lack of danger to the public as expressed in the term matrices? May the BPH's and/or governor's lay opinions and standardless assessment of the gravity of the offense disregard a jury's and/or court's determination and/or a plea agreement? Does such an interpretation of the statutes violate rules of statutory construction and unlawfully deprive petitioners of a state and/or federal liberty interest in parole release?

In reviewing the BPH's and/or governor's decisions, does the "some evidence" standard of review preclude meaningful judicial review for more than pro forma consideration as opposed to consistent due consideration? Moreover, is the "some evidence" standard an unreasonable application of U.S. Supreme Court authority, given the

obvious qualification as stated in Superintendent v. Hill (1985) 472 U.S. 445, when the hearings are not "exigent circumstances"?

Petitioner therefore respectfully requests that this Honorable Court and the Justices thereon grant this Petition For Review with a view towards settling important matters of statewide importance, affecting thousands of similarly-situated inmates. And, further, to consider whether or not federal constitutional laws have been violated by respondents and/or their agents of the Executive branch, i.e., BPH staff, California Department of Corrections and Rehabilitation, named or unknown, et al.

#### POINTS AND AUTHORITIES

##### ARGUMENT

1.

THE BPH'S REFUSAL TO SET PETITIONER'S PAROLE RELEASE DATE, BASED ON THE EVIDENCE PRESENTED, UNLAWFULLY DEPRIVED HIM OF A CONSTITUTIONALLY-PROTECTED STATE AND FEDERAL LIBERTY INTEREST.

A. California's Statutes Give Rise To A Liberty Interest Protected By The Due Process Clauses Of California And U.S. Constitutions.

It has been long established that California's parole statutes contain sufficient substantive predicates to give rise to a constitutionally-protected liberty interest. McQuillen v. Duncan (9th Cir. 2002) 306 F.3d 895; Biggs v. Terhune (9th Cir. 2003) 334 F.3d 910; citing U.S. Supreme Court authority: Wolff v. McDonnell (1974) 418 U.S. 539; Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S. 1; Board of Pardons v. Allen (1987) 482 U.S. 369.

Pursuant to PC §3041 and rules of statutory construction authority petitioner respectfully requests that, if possible, every word and clause of a statute SHALL be given effect. This becomes crucial where the statutory scheme mandates that parole release dates are normally to be set at the *initial* parole hearing which SHALL be held one year before an inmate becomes eligible. And, construed as closely to its actual meaning as is legally possible where, one year prior to the MEPD, an inmate SHALL have a parole release date set at that time in a manner that will provide for uniform terms based on certain criteria specified by statute and/or regulations, as indicated by the matrices of similar crimes, and a date for parole may only be withheld if the BPH makes a reasonable determination that an extended period of incarceration is required in the interest of public safety due to the gravity of the current convicted offense, and/or the gravity and timing of a past offense.

This suitability determination, however, may not be arbitrary, capricious, or whimsical. The evidence relied upon must tend logically and by reasonable inference to establish facts relevant to suitability unless a factual determination is made of unsuitability. In re Morral (2002) 102 Cal.App.4th 280, 298-99. Furthermore, that evidence must bear some indicia of reliability. Jancsek v. Oregon (9th Cir. 1987) 833 F.2d 1389, 1390. CCR, title 15, §§ 2402

Petition For Review.

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THE COURT\*:

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The petition is denied.

\*MALLANO, Acting P. J.

VOGEL, J.

JACKSON, J.\*\*

\*\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

and 2281 set forth the criteria and general guidelines implementing the parole statutes and provide standards in making that determination. (See footnotes to Regulations, citing as authority PC §§ 3041, 3052, and 5076.2).

B. The Parole Statutes Impose An Affirmative Obligation On The Board To Set Release Dates; The Regulations Implement Those Statutes.

The BPH's regulations pursuant to PC §3041(b), state a prisoner may only be found unsuitable if the BPH determines that the offense or past (convicted) offenses and present timing is of such gravity that a longer period of incarceration is required in the interest of public safety. The determination is made based on the standards set forth by the BPH's regulations. The principle guideline in making the determination is CCR §2402(c), et seq., which, as is the Matrix, are now well-known to this Court. (A copy of those specified criteria are attached as Exhibit "B".)

As will be noted at Exhibit "B", Circumstances (1), (2), and (4) of CCR §2402(c), arguably reflect the subset of allowable exceptions in the criteria to setting parole release dates; the current or past offense(s). Factor (E) of subsection (1), however, is a rare circumstance as there is almost always as here, an explanation as to why the offense occurred. Whether the motive truly was trivial or inexplicable is another matter that, as one court noted, has a somewhat illusory acceptance:

"The epistemological and ethical problems involved in the ascertainment and evaluation of motive are among the reasons the law has sought to avoid the subject. As one authority has stated, "hardly any part of penal law is more settled than that motive is irrelevant." [Hall, General Principles of Criminal Law, (2nd ed.1960) at p.88; see also Husak, Motive and Criminal Liability (1989) vol.8, No.1 Crim. Justice Ethics 3.]"

The court further explained:

"The offense committed by most prisoners serving life sentences is, of course, murder. Given the high value our society places upon life, there is no motive for unlawfully taking the life of another human being that could not be deemed 'trivial'. The Legislature has foreclosed that approach; however, by declaring that murderers with life sentences must "normally" be given release dates when they approach their Minimum Eligible Parole Dates (MEPD). PC §3041(a)." In re Scott, (Scott I) (2004) 119 Cal.App.4th 871, 892-93. (governor's rescission of parole unanimously reversed, Scott II (2005) 133 Cal.App.4th 573; 34 Cal.Rptr.3d 905. Review/De-publication denied 12-2-05; see: attached copy of Dec. 2, 2005, Los Angeles edition of the Daily Journal, p. 13803, attached hereto as Exhibit "C").

It is therefore questionable whether the factor has any evidentiary value in this case. If the motive was indeed inexplicable, "A person whose motive for a criminal act cannot be explained or is unintelligible is therefore unusually unpredictable and dangerous." (Scott I, p. 893.) Such is certainly not the case presented here and warrants close scrutiny by this Court.

Justice Moreno's Dissent in Dannenberg illustrates just what is lacking in the present judicial interpretation of the statutory language and is notable because, as was written there:

"There is, as the majority notes, a tension between P.C. § 3041, subdivisions (a) and (b)[]]. But [t]he function of the court in construing a statute 'is simply to ascertain and declare what is in the terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as to give effect to all.' (CCP, § 1858). Ventura County Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483, 492. The majority fails to perform this basic function, **reaching its result by ignoring or discounting much of section 3041.** (emphasis added to original).

The primary circumstances and factors considered when making the determination, CCR §§2402(d)(1)(B) and (D), have been explained by the courts. To qualify for the authorized exception, an offense must be exceptionally egregious or especially grave.

The Court of Appeals characterized this as follows:

"In re Van Houten (2004) 116 Cal.App.4th 339, illustrates the sort of gratuitous cruelty required. The prisoner in that case was involved in multiple stabbings of a woman with a knife and bayonet. While she was dying, the victim was made aware her husband was suffering a similarly-gruesome fate. As stated by the court, "[t]hese acts of cruelty far exceeded the minimum necessary to stab a victim to death." (Id. At p. 351) Other examples of aggravated conduct reflecting an "exceptionally callous disregard for human suffering", are set forth in BPH regulations relating to the matrix used to set base terms for life prisoners (§2283, subd. (b)); namely, "torture", as where the "[v]ictim was subjected to the prolonged infliction of physical pain through the use of non-deadly force prior to the act resulting in death", and "severe trauma: as where "[d]eath resulted from severe trauma inflicted with deadly intensity; e.g., beating, clubbing, stabbing, strangulation, suffocation, burning, multiple wounds inflicted with a weapon not resulting in immediate death or actions calculated to induce terror in the victim." (Ibid., Scott I., supra, at p. 892.)

In this case there is no gratuitous cruelty or torture. Moreover, even in such exceptional cases, the matrix suggests appropriate "extended" terms. CCR §§2402(a), (b).

Circumstance (3) of the unsuitability factors: "Unstable Social History" is not inapplicable where petitioner has demonstrated stable relationships with others since incarceration, nor is there a nexus between pre-conviction history and current threat to public safety in this matter.

Circumstance (5), Psychological Factors. "The prisoner has a lengthy history of severe mental problems related to the offense.", is hardly ever a factor to be considered in most parole situations in Level II prisons and is not applicable at all in this case, as indicated by the latest professionally-accepted Psychological Report or by previous reports by very different doctors; mental health experts specifically trained to evaluate and report their analysis. Not one of these experts has found petitioner wanting nor in need of therapy, (which is nonexistent for mainline inmates without a reality-based, professionally prescribed and verifiable need.)

Circumstance (6), Institutional Behavior. "The prisoner has engaged in serious misconduct in prison or in jail." Perhaps, pursuant to CCR §2410, which provides for the granting or denial of 'post-conviction credit', it is reasonable to deny credit to indeterminately sentenced prisoners, but this factor should not be used to substitute for a statutory provision which specifies that only the gravity of the current or past convicted offense(s) could be

Petition For Review

grounds for withholding setting of a term, and only when the gravity is exceptional in light of PC §3041(a), that parole release dates should not normally be set. (emphasis added.)

Petitioner submits that the Legislature would not have specified that the gravity of the current or a past convicted offense could be a basis of denial if it had intended that the BPH has the broader discretion of PC §3041(b). Therefore, 'misconduct' or any other specious reasoning should not be used to deny parole continuously. As a point of fact, these same factors have been considered to be an "intrusion of irrelevant post-conviction factors in the determination of the punishment [that's] proportionate to the offense". In re Rodriguez (1975) 14 Cal.3d 639, 654-55, and those various cases following as its progeny.)

C. The Board Of Parole Hearings Does Not Have The Almost Absolute Discretion It Had Under Determinate Sentencing And Should Normally Be Required To Set Parole Terms Within The Guidelines.

Notwithstanding that later decisions continue revising the interpretive gloss of the statutes and regulations, in 1982, immediately after the Determinate Sentence Law enactment and revised PC §3041 were enacted in 1977, the newly enacted law was interpreted by this Court as follows:

"Under the ISL, we previously viewed parole thusly: "In the general field of criminal law the Legislature has abandoned infliction of fixed terms for certain crimes, and substituted the indeterminate sentence, leaving to the Adult Authority the judgment of the period of incarceration. The Adult Authority does not fix that period pursuant to a formula of punishment, but in accordance with the adjustment and social rehabilitation of the individual analyzed as a human composite of intellectual, emotional, and genetic factors." People v. Morse (1964) 60 Cal.2d 631, 642-43, (footnotes omitted.) ¶ In contrast, by altering the statutory scheme and enacting the Determinate Sentencing, the Legislature recited specifically that it "finds and declares that the purpose of imprisonment for crime is punishment." (PC §1170(a)(1), all subsequent statutory references are to this code.) The new law provides that an inmate's "release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. **The BPH shall establish criteria for the setting of parole release dates** and in doing so *shall* consider the number of victims of the crime for which the prisoner is sentenced and other factors in mitigation or aggravation of the crime." (§3041, subd. (a), emphasis added.) The present parole guidelines were promulgated pursuant to the new Act. **Thus, the guidelines are not mere administrative responses to the BPH's internal shifting discretion but rather reflect basic legislative alterations in the underlying parole scheme.**" In re Stanworth (1982) 33 Cal.3d 176, 182. (bold *italics* added.)

Stanworth noted, "Under both the 1976 [rules] and the current rules, a life prisoner must first be found suitable for parole before a parole date is set." (*Id.* At p.183.) However, the BPH's discretion in that respect has been limited, as in Montana:

"That the Montana statute places significant limits on the BPH's discretion is further demonstrated by its replacement of an earlier statute which allowed absolute discretion ..." Allen, *supra*, at p. 369.) (bold emphasis added.)

In California, the former PC §3041, which granted the BPH's almost absolute discretion was replaced with

the current one that specifies when and why the BPH may act. PC §3041(b) specifies that in consideration of public safety, with respect to the gravity of the offense or timing and gravity of a past offense, an extended period of incarceration may be required. Rules of statutory construction mandate that PC §3041(b) must be construed in context with PC §3041(a), and the mandate that parole dates *shall* normally be granted one year prior to parole eligibility, which occurs when the MEPD (minus good-time) has been served. "With respect to persons sentenced to indeterminate terms, the purpose of punishment is satisfied by the requirement of service of a minimum period before eligibility for parole ..." Morrall, supra, at p. 292. An "extended period of incarceration", then, is with reference to that minimum "normal" term. The matrix guidelines provide suggested terms; some "extended" according to the gravity of the specified offenses, in complete accord with PC §3041 read as a whole.

The CCR's §§2282 and 2403 establish the circumstances and victim factors that suggest appropriate terms, but the same circumstances and factors are used instead to make unsuitability determinations of "inmate unsuitable" for parole release. Petitioner submits the guidelines have been, are being, and will be used in an unconstitutional manner. Practices like these have been condemned by Rodriguez, supra, and those condemned practices have resumed. Furthermore, the BPH continues invoking its discretion to disregard the reasonable execution of the statutes, refusing to normally set parole release dates. The Ninth Circuit has inferred that just such a practice could, or already may have, violate(d) due process:

"The parole board's decision is one of 'equity' and requires a careful balancing and assessment of the factors considered. [cite] As in the present instance, the parole board's sole supportable reliance on the gravity of the offense and the conduct prior to imprisonment to justify a denial of parole can be initially justified as fulfilling the requirements set forth by state law. Over time, however, should [petitioner] continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of [his] offense and prior conduct would raise serious questions involving his liberty interest in parole." Biggs, supra, at p.916, citing to Greenholtz.

The minimum statutory term for kidnap for ransom/robbery is seven (7) years; for second degree murder it is ten (10) years with credit reduction; for first degree murder it is sixteen (16) years (8) months with credit reduction. At the other end of the spectrum, the highest matrix on: kidnap for ransom/robbery is seventeen (17) years; second degree murder up to twenty-one (21) years; first degree murder at up to thirty-three (33) years.

The reasonable meaning of "early parole" is the minimum eligible term, and extended terms logically are the highest matrix terms probably exceeding the normal terms due to "exceptional" offense circumstances, prior convictions involving violence, or substantial evidence of current dangerousness. More time could be exacted in accordance with CCR §2410, withholding "post-conviction" credit for failure to participate in self-help or similar programming, and/or avoiding available therapy, or for incurring (a) serious disciplinary infraction(s). Such factors should not be continuously used indefinitely, however, to find unsuitability and certainly not BY ROTE!

In the watershed case opinion leading up to the enactment of the current Determinate Sentence Law (DSL) and PC §3041, the Court explained:

"Prompt term-fixing will not only serve to alleviate one of those causes of anxiety now affecting inmates, but will also *prevent the intrusion of irrelevant, post-conviction factors in the determination of the punishment that is proportionate to the offense of the particular inmate.*" Rodriguez, supra, 654-55. (emphasis added to accentuate current parole system failure.)

Although the most recent interpretation the statutes by Dannenberg, supra, now holds that proportionality or comparison of like offenses, as part of suitability determinations, is not required, the enactment of the DSL and enactment of PC §3041 was remedial for all similarly-situated inmates. (In re Neal (1980) 114 Cal.App.3d 141, 145.) Even if the state's interpretive gloss has changed, it is clear that because petitioner has a state and federal liberty interest vested by statute as determined by Supreme Court authority, the *constitutional* effect cannot be ignored:

"While the interpretive gloss on the statute may bind this court as a matter of statutory construction, we are not, however, similarly bound as to the **constitutional effect** of that construction." (McSherry v. Block (1989) 880 F.2d 1053; Aponte v. Gomez (9th Cir.1993) 993 F.2d 705.) (emphasis added.)

The constitutional effect of the current interpretive gloss is that it deprives inmates of the remedial intent of the Legislative changes in PC §3041, and the vested liberty interest that parole dates were to be set one year prior to the eligible date. The words "shall normally" of PC §3041(a) have been omitted by the current construction of the statute section:

"It is our duty 'to give effect, if possible, to every clause and word of a statute. Montclair v. Ramsdell (1882) 107 U.S. 147; rather than to emasculate an entire section, as the Government's interpretation requires." Minnesota v. Probate Court (1940) 309 U.S. 270, 277.

Lastly, the BPH has stated that the matrices do not apply unless and until an inmate is found suitable. Implementing PC §3041, the regulations state that the base term is to be set *solely* in accordance with the gravity of the offense. (CCR §2403(a).) The circumstances indicating the gravity, or seriousness, of offenses have been established by the matrices, yet the same circumstances and victim factors are used to find inmates unsuitable, continuously, as is "normally" done in virtually all cases.

"It is simply irrational for [the] seriousness of the offense to be used first to determine the appropriate guideline period and then to be used again as the stated reason for confining a prisoner beyond that guideline." Little v. Hadden (1980) 504 F.Supp. 558, 562 (citing Lupo v. Norton (196\_) 371 F.Supp 156, 163.)

The BPH's identical, and arbitrary, use of the Regulations is inconsistent with statutory language and unlawfully deprives similarly-situated inmates like petitioner of a vested liberty interest.

#### Ground 2.

APPLYING THE "SOME EVIDENCE" STANDARD FOR REVIEWING THE  
BPH'S PAROLE SUITABILITY DECISIONS IS AN UNREASONABLE APPLICATION  
OF PREVAILING U.S. SUPREME COURT AUTHORITY.

A. The "Some Evidence" Standard Militates Against The  
Reasonable Execution And Enforcement Of Applicable  
Statutes and Regulations As Decisional Law States.

Petitioner contends that because the language of PC §3041 together with the kidnap/murder statutes' minimum terms gives rise to a substantial federally-protected liberty interest which may not be abridged by the institutional "some evidence" standard of judicial review.

The administratively-imposed and judicially-sanctioned minimally stringent "some evidence" standard of judicial review of the Executive branch's decisions prevents a court from effectively safeguarding California prisoners' Constitutionally-protected state and federal liberty interests. This is so because, under the present standard, a court's review is limited to determining only whether "a modicum" of "some evidence" exists to support the BPH's finding of unsuitability and without substantial evidence or preponderance of the evidence standards as the guidepost, a court may not reweigh the evidence as it is proffered and thus, review will always fail to give appropriate respect to the Legislature's clear intent in establishing minimum terms. Cabling these defined standards together with parole statute language would fulfill the mandate that terms are "normally" to be set, ab initio.

Clear and convincing evidence demonstrates that the BPH and governors have failed to administer the statutes and regulations in a manner reasonably faithful to the plain language of PC §3041, granting only a mere token number of parole dates, the vast majority of which are reversed. The BPH's claim of almost absolute discretion and the "duty to give individualized consideration" to rationalize and justify the fact fails, as is shown below.

B. Differences Between Disciplinary Hearings And Parole  
Suitability Hearings Precluded The Application Of  
The "Some Evidence" Standard Which Does Not Meet The  
Federal "Substantial Evidence" Standard Of Evidence To  
The Review of BPH's Parole Suitability Hearings.

Although the Ninth Circuit adopted the "some evidence" standard in Jancsek, supra, the issue there however, WAS NOT PAROLE SUITABILITY. And, this class of cases did not contemplate the qualitative nor quantitative differences in parole denial, which has a substantial evidence test and credit revocation, which only requires a preponderance of the evidence. The disparities in their results and magnitude of the respective deprivations, as Superintendent v. Hill advised with respect to the sufficiency of the evidentiary standard, should not be compromised.

Prison disciplinary proceedings often do involve "exigent" circumstances that require swift action on the basis  
Petition For Review,

of minimal or insubstantial evidence in the interests of prison operations and security, e.g., prevention of riots, assaults, retaliations, or punishing actions that might not be legally provable but reasonably certain to have occurred, similar to the Hill case. Disciplinary proceedings are due to serious rules violations, sometimes involving new charges and court involvement. Disciplinary proceedings are very informal, usually involving only a correctional lieutenant conducting the hearing, and generally involving the loss of not more than six (6) months of credit, but oftener, just days or weeks. Credit loss can usually be regained after a certain period of good behavior, an incentive for better conduct, compliant programming, respect for staff; a legitimate and self-explanatory prison interest backed by all of the interested parties.

By contrast, parole suitability proceedings take place only after an inmate has become eligible for parole and has served a long period of incarceration sufficient to satisfy the MEPD requirement of the law. In the case of second degree murders, ten years is the minimum time required to satisfy statutory requirements. During that period, the prisoner has generally been working to get a high school certificate (GED), vocational/trade completions, attending self-help groups and therapy (if suggested and available). Also, participating in encounter groups such as Alcoholics Anonymous, Narcotics Anonymous, Anger Management and so forth, and generally maturing and staying out of trouble in expectation of receiving a parole in accordance with statutory language.

These hearings, if not as formal as court proceedings, are nonetheless very structured. Parole suitability hearings are scheduled with months (even years, due to systemic delays) of notice to judges, d.a.'s, victims or relatives of the deceased and/or their representatives, and other interested parties, as notice requires. An attorney is usually requested and appointed, the parole applicant is sworn in, put under oath, and hearings begin. One or two commissioners and a deputy commissioner conduct different aspects of the hearing, a deputy district attorney is usually present (via video-link) and may participate, ask questions, or make comments as asked through the commissioners. The entire proceedings are audio- and/or video-recorded, later transcribed and copies given to inmates and all concerned parties.

Qualitatively, then, parole suitability hearings do not involve "exigent circumstances", the qualifying consideration articulated by Hill. Reason dictates there are no day-to-day prison management interests at stake, unlike prison disciplinary proceedings. Quantitatively, parole suitability proceedings involve denial of parole for up to two years, and after the 1994 Amendment to CCR §2270(d) for up to five (but compare §2268(b), §2400). These years of time, added in the "interests of public safety", cannot be restored nor replaced. Prison disciplinary proceedings generally involve the revocation of up to six months credit which can normally be restored after a disciplinary-free period and is normally granted at the first request.

The deprivation of parole for up to five years, multiple times, hardly seems comparable to a few month's credit loss, which, after restoration, puts an inmate in exactly the same position as before the infraction, unlike parole denial of many years, sometimes doubling the MEPD. These very significant differences illustrates why the High Court in Hill stated that the "some evidence" standard might not be constitutionally sound in "less exigent" circumstances than those involved in *prison disciplinary proceedings*. (*Id.* at p.455, emphasis added.)

A more recent High Court case addressed a similar issue involving prison administration concerns. Sandin v. Conner (1995) 515 U.S. 472, like Hill, was also concerned with prison regulations, involving "... the language of intricate, often routine prison guidelines", and whether mandatory language of regulations created a protected liberty interest. (*Id.* at 480.) In Sandin, the Court retreated from its previous approach in Hewitt v. Helms (1983) 459 U.S. 460, (prison regulation regarding administrative segregation), in determining whether a prison regulation created a protected liberty interest, because the ruling in Hewitt has led to "undesirable effects."

The Court noted that Hewitt had "created disincentives for states to codify prison management procedures" and had led to the "involvement of federal courts in the day-to-day management of prisons." Sandin, *supra*, at p. 482-483. In its decision, the Court explained how, for prison administrators, more flexibility was "warranted in the fine-tuning of the ordinary incidents of prison life." *Id.* The rule adopted in Sandin was whether the action taken "imposes atypical and significant hardship(s) on the inmate in relation to the ordinary incidents of prison life.", in determining whether due process protections were implicated.

Thus, Sandin, like Hill, involved due process liberty interests with respect to prison regulations and management concerns. It is, of course, not a prison regulation pertaining to prison management or related prison disciplinary proceedings at issue in the present matter, but rather statutes governing parole release, protected by the Due Process Clause because a cognizable liberty interest has been created by statutory language. McQuillen, *supra*, at p. 902; Biggs *supra*, at p. 915.

The issue here is a statutorily-mandated proceeding to determine whether, after many years of programming-oriented incarceration, a prisoner's offense was of such exceptional gravity, or whether the prisoner's post-conviction conduct has been so demonstrative of unsuitability, that consideration of public safety requires extended periods of further incarceration beyond the minimum requirements of normal terms. (If structured proportionality wasn't contemplated by the Legislative branch at the time of the statute's initiation, why was a different term set for the crimes of first, second, and attempted murder, and kidnap for ransom/robbery, and why were specifically-graded recommended matrix terms established? Why is PC §3041(a) worded as it is?).

Although, as previously discussed, both loss of credit and denial of parole both affect the duration of the

sentence, the magnitude of the deprivation is much greater when parole is denied after serving a lengthy term and more so when prisoners are repeatedly denied for up to five years, again. Also, because of the fact that no prison interests such as security, discipline or the like are involved, the Hill broadsword, like the Sandin rule, is wholly inappropriate. And, if anything, the "some evidence" standard has led to the necessity of federal court intervention and involvement to review the BPH's decisions because state courts are limited to only reviewing for "some evidence" and almost universally refuse to find federal constitutional violations when confronted with patently obvious violations of the same. As such, the "some evidence" standard has "created disincentives" for the BPH to apply its rules in a manner comporting to federal standards of evidence or in any seemingly reasonable manner and thus requiring federal review.

Even in the context of prison disciplinary proceedings, the High Court has explained that due process requires something more than "some evidence", and that this standard applies *only* to questions of evidentiary sufficiency as an additional requirement of due process, and "is not a substitute for other established due process requirements." Edwards v. Balisok (1997) 520 U.S. 641, 648. As the Ninth Circuit has recognized, there will always be material that, under the "some evidence" standard, factors against a grant of parole:

"[I]ndeed, 'some evidence of unsuitability for parole would exist in virtually **every** parole hearing, exposing every grant of parole to a BPH's subsequent change of heart or political whim.' (McQuillen, supra, at p.905; In re Caswell (2001) 94 Cal.App.4th 1017.) (emphasis added).

In Sandin, supra, the High Court expressly reiterated that "states may, under certain circumstances, create liberty interests which are protected by the Due Process Clause." Id. at 483-84, citing Allen, supra. Therefore, it is very clear that the Court did not mean to alter the rules set forth in Greenholtz and Allen with respect to liberty interests that a state's parole scheme may legitimately create. Logically neither, then, did Hill intend that its "some evidence" decision there should apply to deprive petitioners of liberty interests created by state statutes. Petitioner submits that the application of the "some evidence" standard of review in the context of parole suitability determinations, where a vested liberty interest is at stake, is an unreasonable application of High Court authority and must fail:

"Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either **unreasonably** extends a legal principle from our precedent to a new context where it should not apply or **unreasonably** refused to extend that principle to a new context where it should apply." (Williams v. Taylor (2000) 529 U.S. 362, 407; citing Green v. French (4th Cir.1998) 143 F.3d 865, 869-70.) (emphasis added.)

C. Not Only Is There A Statistically-Recognized No Parole Policy/Practice Prevalent At Suitability Hearings Which Precludes The Application Of PC § 3041(a) But The BPH Panels Are Biased By Recognition Of The Same.

The Santa Clara County Superior Court, case no. 71614, has recently ordered major changes to the BPH's unfounded and consistently erroneous use of the unchanging facts to repeatedly deny parole worthy inmates a release as mandated by PC § 3041(a) but the actual presence of bias is shown therefrom. Attached is a copy of the Proof of Service in the matter of In re Criscione, et al., to give reference to this allegation; Exhibit "E".

#### CONCLUSION

Here, then, the abiding question in this case is whether the evidence will reasonably support a conclusion that petitioner poses an unreasonable risk of danger or a threat to public safety, AT THIS MOMENT. Inherent in this idea of finding "suitability first" as the leading procedure, where the suitability determination precedes any consideration of the already-served term or lengthy period past the MEPD, must not devolve into casting a wide net with the unstated intention of denying all otherwise suitable inmates by reciting a mantra of "some evidence, suitability denied."

This, unfortunately, is essentially what has become the "normal" method currently utilized to deny parole-ready and suitability-worthy petitioners of any semblance of fair play and any court's acquiescence in this charade should be publicly aired and universally castigated as a political solution of the worst sort. Individual freedom is far too important to lie fallow in a politically-driven and inspired climate where such greater minds exist and have an imprimatur of trust.

Though a uniform term is based on historical facts, the issue as to whether petitioner is suitable for parole must be based on whether the inmate is currently a threat to public safety and the state's experts should not be ignored where their opinions are in harmony with a suitable-to-release finding. The question must be asked, "Does the BPH or governor abuse it's discretion when they reject for the most specious of reasons, a professional Report based on an ethical expert's opinion that cannot be contradicted by a lay assessment of alternative 'facts'?" If the answer is "Yes.", then it is incumbent upon a Court of equity to review and, if necessary, reverse whatever damage has been done by these scurrilous attempts to circumvent the legal process and deny a worthy individual a second chance to succeed.

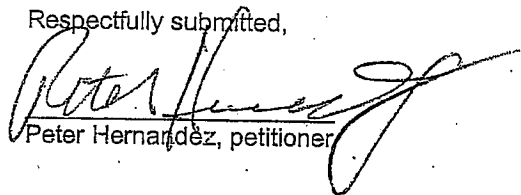
A second related question of importance is whether the "some evidence" standard for judicial review of parole suitability decisions can continue to be considered constitutionally-sufficient in light of the Sandin decision

distinguishing liberty interests in the context of prison management and associated flexibility concerns and "the real concerns under girding the liberty protected by the Due Process Clause", citing Wolff, supra; Allen, supra. Sandin made it clear what Hill, supra, alluded to: that one is constitutionally permissible, but the other, not involving "exigent circumstances", is not. Hill, supra, at p.455. This is particularly so given statutory language vesting a liberty interest in the overall proceedings.

Petitioner respectfully requests review so that this Court may consider these questions of statewide and constitutional importance. Moreover, in light of Sandin, supra, and Irons v. Warden (2005) 358 F.Supp.2d 936, to provide the Court with an opportunity to consider whether the denial by the court of appeals is an unreasonable application of established U.S. Supreme Court precedent and authority, thereby depriving similarly-situated petitioners of a federal liberty interest protected by Due Process and Equal Protection Clauses of both state and federal Constitutions. This Court must now address these issues by way of Review.

Dated: 1-11-08

Respectfully submitted,

  
Peter Hernandez, petitioner

**EXHIBIT H**

*Chau ching*

Court of Appeal, Second Appellate District, Div. 1 - No. B202757  
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LOS ANGELES

MAR 24 2008

J. SANTOS

NC LA 2007 602038

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

In re PETER HERNANDEZ on Habeas Corpus

The petition for review is denied.

SUPREME COURT  
FILED

MAR 19 2008

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice